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DECISIONS

OF THE

COURT OF SESSION,

From November 1781 *to Auguſt* 1787.

COLLECTED BY

ALEXANDER LAW, WILLIAM STEUART, and ROBERT CRAIGIE, Eſqrs,
ADVOCATES.

By Appointment of the FACULTY of ADVOCATES.

EDINBURGH:
PRINTED FOR BELL & BRADFUTE,
Bookſellers to the FACULTY of Advocates.

M DCC XCII.

BRITISH MUSEUM
28 FEB 46

DECISIONS

OF THE

COURT OF SESSION.

N° I. *November* 14. 1781.

CREDITORS of Sir THOMAS WALLACE-DUNLOP,

AGAINST

Meſſ. BROWN and COLLINSON Bankers in London.

ADJUDICATION—*in ſecurity of contingent claims.*

SIR THOMAS WALLACE ſold a part of his lands to Meſſ. Brown and Collinſon, at twenty-nine years purchaſe, according to a ſigned rental; which Sir Thomas became bound to warrant for twenty-ſeven years.

Upon this obligation of warrandice, Meſſ. Brown and Collinſon led an adjudication *in ſecurity* againſt Sir Thomas's other lands and eſtates; to which, in the ranking of Sir Thomas's creditors, it was

Objected by the creditors: No illiquid debt can be ſecured by adjudication; Erſkine, b. ii. tit. 12. § 9.; Stair, b. 3. tit. 2. § 15. An adjudication *in ſecurity* is of that ſort which has come in place of appriſings; with this difference only, that the legal never expires. It is therefore properly a ſale under a perpetual power of redemption; but ſtill it is a ſale, and as ſuch requires a liquid price. The adjudication in queſtion, however, is founded on as a ſecurity, not only for the deficiencies alleged to have been already incurred, and which have not been liquidated by any decree, but alſo for deficiencies, which do not now, and may never exiſt.

Anſwered by the adjudgers: It is admitted, that an adjudication for *payment* cannot proceed, except upon a liquid debt. But this rule

does not hold with reſpect to adjudications in *ſecurity*. And the reaſon of the diſtinction is obvious. By the old form of appriſings, as much of the debtor's heritage was given to the creditor as was reckoned equivalent to his debt; and unleſs the debt was liquid, the ſheriff could not poſſibly determine what quantity of lands it was proper to make over. The ſame reaſon holds in ſpecial adjudications upon the firſt alternative of the act 1672: and even in general adjudications for *payment*, it is neceſſary that the debt ſhould be liquid, in order that the debtor may know the preciſe amount of the redemption-money.

But theſe reaſons do not apply to adjudications in *ſecurity:* for though they are always general, and extend to the debtor's whole heritage; yet, as the legal never expires, the property can never be thereby transferred to the adjudger. Neither is it here neceſſary that the debtor ſhould know the preciſe amount of the debt, becauſe he may *at any time* recover his lands, upon ſhewing that the creditor has been fully ſatisfied.

Accordingly, this ſort of adjudication has ever been conſidered as a competent way of affecting the debtor's heritage, in *ſecurity* of ſuch debts as can only be liquidated *de anno in annum*, or of ſuch as cannot properly be the foundation of an adjudication for payment. Thus, a widow may adjudge in ſecurity of her liferent; a cautioner in ſecurity of his relief; and a purchaſer in ſecurity of his warrandice; Bankton, b. 3. tit. 2. § 78.; Hamilton *contra* Chieſly, 24th February 1675; Bruce *contra* Hepburn, 2d January 1684, obſerved by Fountainhall and Falconer. Theſe ſeveral claims are not more liquid than the preſent. Like it they are contingent on future events; but they are all equally capable of being ſecured by adjudication.

The court had no difficulty upon the competency of the adjudication, as a ſecurity for both the paſt and the future deficiencies; and therefore "repelled the objection."

Lord Reporter, *Weſthall.* Clerk, *Orme.* For the Objectors, *J. Swinton.* Alt. *Robertſon.*

L.

N° II. *November* 14. 1781.

Lord REAY,

AGAINST

The Reverend Mr ALEXANDER FALCONER.

GLEBE. *Right to the ſea-ware on the ſhore of one.*

LORD REAY inſiſted to have it found and declared, That Mr Falconer, as miniſter of Edrachilles, had no right to the ſea-ware upon the ſhore of his glebe, except for the purpoſe of manuring his land

land and feeding his cattle; but that the ſole and excluſive privilege of manufacturing ſaid ſea-ware into kelp belonged to his Lordſhip, in virtue of ancient infeftments.

Pleaded for the purſuer: The pariſh of Edrachilles is part of the Reay eſtate; and, about fifty years ago, when it was disjoined from the pariſh of Durneſs, Lord Reay agreed that a very extenſive tract of land ſhould be deſigned and allocated as a glebe for the miniſter. But in this deſignation, although the boundaries are diſtinctly marked, there is no mention of ſhores, nor any clauſe upon which a right to ſea-ware, as part and pertinent, can be founded. The original right therefore of the family of Reay ſtill continues, and muſt be ſufficient to exclude any right competent to the miniſter in virtue of the deſignation above mentioned.

The view of the legiſlature in making this proviſion for the clergy, evidently was, that ſuch of them as are ſituated in the country might have conveniencies about them, which perhaps no addition of ſtipend could otherwiſe ſupply. This is the idea which runs through moſt of the ſtatutes relative to glebes, as appears both from the ſituation and extent thereby preſcribed; *vide* acts 1563, c. 72. 1572, c. 48. and 1606, c. 7. But to ſuppoſe that, under that denomination, any right to ſea-ware, for the purpoſe of manufacturing it into kelp, can be comprehended, is equally inconſiſtent with the deſign of the proviſion, and with the dignity of the clerical character.

The purſuer, however, though he doubts the miniſter's right to it, does not mean to deprive him of the privilege of uſing the ſea-ware in the way of manure and paſture. In the exerciſe of that privilege Mr Falconer has always been freely indulged. It is by no means incompatible with the right now contended for, and is not ſtruck at by the preſent action.

Anſwered: Whenever lands are legally deſigned as a glebe for the pariſh-miniſter, the former heritor is completely diveſted of them. The property from that moment belongs to the church, and the ſuperiority goes to the crown, which accordingly has right to the liferent-eſcheat of the incumbent lying year and day at the horn; act 1572, c. 49. The deſignation therefore of a glebe is equivalent to an infeftment, and is equally capable of carrying whatever is poſſeſſed as part and pertinent of the lands.

Neither is this general right at all limited by the terms of the deſignation in queſtion. It is conceived in the uſual form, and conveys to the miniſter of Edrachilles as full and ample a right as any miniſter in Scotland has to the glebe which he poſſeſſes. He is therefore entitled to the ſea-ware upon his own ſhore as part and pertinent; and is not reſtrained by the nature of his right from the free uſe of this more than of any other part of his benefice.

Obſerved on the Bench: The deſignation of a glebe is like a bounding charter. Here the deſignation makes no mention of ſhores; and the miniſter is circumſcribed by the terms of his own right.

The court, therefore, *adhered* to the interlocutor of the Lord Ordinary, who had "decerned in terms of the declarator."

Lord Ordinary, *Hailes.* Act. *Honyman.* Alt. *Robertſon.* Clerk, *Home.*

L.

N° III.

N° III. *November* 16. 1781.

The PRESES and SOCIETY of SOLICITORS before the Commiſſary, Sheriff, and City Courts of Edinburgh,

AGAINST

THOMAS ROBERTSON, Printer.

REPARATION. *A ſlight verbal injury to a body-corporate,—if actionable.*

THE Society of Procurators practiſing in the commiſſary and inferior courts at Edinburgh, obtained a charter from the crown, erecting them into a corporation, under the name of "The Society "of Solicitors before the Commiſſary, Sheriff, and City Courts of "Edinburgh." This grant was notified in the London Gazette; and an advertiſement to the ſame purpoſe appeared likewiſe in the Edinburgh newſpapers; in which, however, inſtead of the word *Solicitors*, as above, the appellation *Solicitors at Law* was uſed; and in addition to the article contained in the Gazette, it was ſaid, That the Society, by their charter, were inveſted with "the ſole and exclu-"ſive right of pleading and conducting ſuits before thoſe Courts, "the Honourable Faculty of Advocates excepted."

Soon after, the following paragraph, apparently drawn up in alluſion to theſe variations, was inſerted in a paper called *The Edinburgh Gazette*, publiſhed by Thomas Robertſon. "A correſpondent in-"forms us, that he hears the Worſhipful Society of *Chaldeans*, *Ca-"dies*, or *Running-Stationers*, of this city, are reſolved, in imita-"tion, and encouraged by the ſingular ſucceſs of their brethren of "an *equally reſpectable* Society, to apply for a Charter of their Pri-"vileges, particularly of the ſole privilege of PROCURING, in the "moſt extenſive ſenſe of the word, excluſive of chairmen, porters, "penny-poſt men, and all other *inferior* ranks; their brethren "the R—Y—L S—L—RS, *alias* P—C—RS, *before the inferior* courts "of this city, always excepted.——Should the Worſhipful Society "be ſucceſsful, they are farther reſolved not to be *puffed up* thereby, "but to demean themſelves with more equanimity and decency than "their *R—y—l*, *learned*, and *very modeſt* brethren, above men-"tioned, have done upon their late dignification and exaltation."

The Solicitors, thinking themſelves injured by the innuendoes conveyed in this paragraph, inſtituted an action againſt Robertſon; and, in their libel, concluded for very high damages, both in behalf of the Society, and of themſelves as individuals.

Pleaded for the defender: A body-corporate, which is not a real but a fictitious perſon, is as little ſuſceptible of hurt by defamatory words as by blows. Such ineffectual abuſe has been thrown even on thoſe public bodies that are of the higheſt deſcription; as, the learned profeſſions, the Judges, the Parliament of Great Britain; yet in no inſtance has any action like the preſent ever been brought. But the raillery

raillery of which theſe purſuers complain, is alſo in its own nature harmleſs and inoffenſive; an effuſion of mirth and pleaſantry upon an appearance of vanity in their deportment. Nor ſhould ſuch a *jeu d'eſprit*, by any forced conſtruction, be made to bear a malicious meaning. Too much zeal for reſtraining innocent freedoms of this kind, has ever been deemed inconſiſtent with the ſpirit of political liberty. The paragraph alluded to betrays no *animus injuriandi*; which, however, is eſſential to every kind of injury, eſpecially the verbal; Voet, lib. 47. tit. 10. § 8, 10.; Blackſtone, vol. 3. p. 124, 126.

Anſwered by the purſuers: It is a miſtake to ſuppoſe, that political bodies are not capable of receiving verbal injury; or that in fact no actions have really been brought on that ground; for many ſuch inſtances have occurred; Bacon's Abridgment, *voce* Libel, vol. 3. p. 494-5.; Dict. of Dec. vol. 1. p. 232. Ewing *contra* Magiſtrates of Edinburgh. With as little propriety is the ſarcaſm in queſtion ſtyled innocent. An intention to injure is not to be concealed under an ironical mode of expreſſion. If the latter be eaſily underſtood, the former is puniſhable; Bac. Abridg. *ibid.* p. 493. The purſuers are no enemies to civil liberty; but the defenders claim the privilege of being licentious. The doctrine of the Roman law on this ſubject, is, that " injuria committitur, ſi quis ad infamiam alicujus libellum, " aut carmen, aut hiſtoriam, ſcripſerit, compoſuerit, ediderit, dolovè " malo fecerit, quo quid eorum fieret;" Inſtit. § 1. *de Injuriis:* A rule which has been adopted by moſt nations of Europe, and, in particular, is received into our law; Bankton, lib. 1. tit. 10. § 24.; Erſk. b. 4. tit. 4. § 80.

The judgment of the Lord Ordinary was as follows: " Having " conſidered the libel, and having heard the cauſe argued at very " great length, ſuſtains action: Finds, That the paragraphs in the " newſpaper entitled the *Edinburgh Gazette*, on which the preſent " action is founded, are not capable of an inoffenſive ſenſe, but, how- " ever dull and ill expreſſed, are malicious; that they tend to expoſe " to ridicule and contempt, and to vilify, a ſociety eſtabliſhed by grant " from the Sovereign, and of which the purſuers are either repreſen- " tatives or conſtituent members; and that the ſaid paragraphs are " calculated, by leſſening their eſtimation, to injure the purſuers; " and therefore, that the publiſher or publiſhers of the ſaid para- " graphs are liable in damages and expences to the purſuers: And, " in reſpect that the defender Thomas Robertſon acknowledges that " he is in poſſeſſion of that manuſcript from which the ſaid para- " graphs were printed and publiſhed, and while he avers that he is " ignorant of the author of the paragraphs, declines to produce in " proceſs the manuſcript itſelf for inſpection of the purſuers, and " thus precludes them from the means of inveſtigating their real " author; finds, That, in law, the ſaid Thomas Robertſon, the pu- " bliſher, muſt be held as the author of the ſaid paragraphs, and an- " ſwerable accordingly; and therefore finds the ſaid Thomas Ro- " bertſon liable in damages to the purſuers: But in regard that no " ſpecial damages are proved, and that no great damages could have " enſued from a publication meriting rather ſcorn than complaint,

" modifies the damages to L. 5 Sterling; and finds the defender " Thomas Robertſon liable in that ſum, to be paid to Mr John Wat- " ſon, Treaſurer of the Society of Solicitors, before the Commiſſary, " Sheriff-court, and City courts of Edinburgh, in order that it may " be divided by the ſaid Society amongſt its members, according to " their reſpective claims and intereſt therein: Alſo finds the ſaid " Thomas Robertſon liable in expences of proceſs; and modifies the " ſame to L. 15 Sterling, together with the expence of the extract of " this decreet, as the ſame ſhall be certified by the collector of the " clerk's dues; and decerns."

Upon adviſing a reclaiming petition for Robertſon, with anſwers, the Lords altered that interlocutor, by " finding no ſufficient *animus* " *injuriandi* proven; and therefore diſmiſſing the action."

The Solicitors, however, in their turn, having reclaimed, the Court altered the preceding judgment, and " adhered to the interlocutor of " the Lord Ordinary."

Lord Ordinary, *Hailes.* Act. *Croſbie, Hen. Erſkine, Hume.* Alt. *Ilay Campbell, J. Boſwell, Arnot.* Clerk, *Menzies.*

S.

N° IV. *November* 20. 1781.

The FEUERS and HEADS of FAMILIES in the Town of Crieff,

AGAINST

The HERITORS of the Pariſh of Crieff.

KIRK.

THE pariſh-church of Crieff being inſufficient for accommodating the whole pariſh, and having likewiſe become ruinous, the queſtion occurred, by whom, and in what proportions, the expence of building a new one was to be defrayed.

The old church was capable of containing 500 perſons; and no diſcovery could be made, by whom it had been either originally erected, or afterwards repaired. The preſbytery of Auchterarder, within whoſe bounds it is ſituated, reported, that the new church ought to be ſufficient to contain 1200 hearers; and that the examinable perſons in the pariſh amounted to 1980. Of theſe, 597 belonged to the landward part of the pariſh; the reſt reſided in the town of Crieff; being either inhabitants of the old burgh of regality of that name, or of an adjacent village, built on grounds feued by the neighbouring heritors.

The queſtion was brought before the court on informations; and appearing to be attended with conſiderable difficulty, became the ſubject of a hearing in preſence; when it was

Pleaded

Pleaded for the inhabitants and feuers: Landed property firſt preſents itſelf as the ſubject of thoſe public burdens which are of a permanent nature. Hence, when tithes, which are a proportion of the produce of lands, were firſt allotted to the maintenance of the Chriſtian church, a fourth part was dedicated to the building and reparation of churches; Burn's Eccleſiaſtical Hiſtory, vol. 1. p. 247. This fund, from the miſapplication of tithes, ſoon became inadequate to the charge; and long before our ſeparation from the Romiſh communion, parſons, or others having right to tithes, were liable only in a third of this expence; the remainder devolving on the *pariſhioners*, according to their ſubſtance; Lord Hailes's Mem. can. 6. And although the import of theſe expreſſions might at firſt ſeem to affect the inhabitants at large, practice, which is the beſt interpreter of laws, has, agreeably to the original nature of this impoſition, confined it to heritable proprietors. It was accordingly levied, not by perſonal taxation, but by aſſeſſments upon land; Spottiſwoode, *voce* Kirkmen.

By an act of Privy-council in 1563 *, ratified in parliament in 1572, the regulations which had been in force before the Reformation were renewed; Sir George Mackenzie's Obſervations. Hence, when, by acts 1690, c. 23. and 1693, c. 25. the miniſters of the Church of Scotland became ſtipendiary, and were of courſe relieved of that part of this burden to which they were formerly ſubjected as titulars of the tithes, the practice did not transfer it to the people of the pariſh, but to the heritors alone; Bankton, b. 2. tit. 8. § 82. From that period, they have been uniformly expoſed to this expence, by aſſeſſments; firſt, according to the real rents of their landed eſtates, and after the general valuation, according to the valued rent. Thus the payment of ceſs points out, with preciſion, not only the perſons ſubject to this expence, but alſo the proportions by which it is levied.

Such being the general rule in this matter, it is next to be conſidered, what are the exceptions, and whether there is room for any in the preſent inſtance? One exception, and the only one which has occurred, takes place where a pariſh is partly landward, and partly made up of a royal burgh. As the ſtatutes have made no proviſion for this caſe, ſo it would appear, that, at firſt, royal burghs, in their corporate capacities, were ſubjected, like other heritors, according to the public burdens or ceſs which they paid; and that the alteration in this reſpect has been owing not to the law, nor to the intervention of courts of law, but to the conduct of the office-bearers in thoſe communities. The magiſtrates, and heads of corporations, have thought proper to erect ſeats for themſelves ſeparately from the reſt of the congregation. In doing ſo, they have appropriated that part of the church to which cuſtom has affixed a degree of eminence and dignity. On theſe accounts, they have been in uſe to ſubject themſelves to a larger proportion of the expence than would fall upon them by the valued rent. Hence, in the caſe of the Town of Kinghorn, Law Dictionary, vol. 3. *voce* Kirk, the court, " in reſpect of " the

* To be found in Lord Kames's Abridgment of Scottiſh Statutes.

" the practice," found that town liable in the half of the expence of building the church, although its valued rent was very inconſiderable. At all events, the reaſons for excepting royal burghs from the ordinary rule do not exiſt in the pariſh of Crieff. A royal burgh, as an aggregate body, may acquire a right, and it is ſubject to legal compulſatories in the perſons of its magiſtrates; whereas a multitude of feuers, or the inhabitants of a village, collectively conſidered, are incapable of either. The firſt may be viewed as a permanent eſtabliſhment; whereas the ſame caſualties which draw the laſt together at one period, may diſperſe them at another.

Farther: A deciſion agreeable to the plea of the heritors, would be attended with great inconveniency, or great injuſtice. The preſent inhabitants of the village of Crieff, from the viciſſitudes incident to people of their rank, muſt ſoon give place to others. If they acquire a property in the church correſponding to their contribution in building, the new-comers muſt be excluded altogether. If, again, the right of the original contributors ceaſes with their reſidence, the new-comers will enjoy ſeats in the church at the expence of the former inhabitants. It is obvious too, that the ſame reaſons which are urged for a departure from the general rule in this caſe, will occur even in a pariſh entirely landward, it being next to impoſſible that the progreſs of population on every eſtate in the pariſh ſhould be exactly uniform.

Neither will the landholders in the end be loſers from the neceſſity of enlarging the church. The ſame cauſes which gave riſe to it, by exciting induſtry, and improvements in agriculture, muſt augment the value and profits of their eſtates; and as they acquire a property in the area of the church proportioned to their ſeveral diſburſements in building it, by letting out what they have no occaſion for to thoſe who have not enough, they will ſoon be enabled to indemnify themſelves.

Anſwered for the heritors: It is quite unneceſſary to go back to the hiſtory of the Chriſtian church, in the conſideration of a queſtion which is preciſely defined by the law of this country. In conformity to the general maxim, " Quod cujus eſt emolumentum, apud " eum onus eſſe debet," the burden now under conſideration has been impoſed on the *pariſhioners* according to *their ſubſtance*. In pariſhes entirely landward indeed, this court has taxed landholders with the whole, according to their valued rents. There the precarious ſituation of the other pariſhioners rendered a deviation from the general rule in ſome degree neceſſary. Beſides, in ſuch a caſe every heritor paying for his tenants, on this account draws a higher rent for his land; and the recourſe to the valued rent, which is a fixed, and in general, a pretty equal ſtandard, by ſaving the trouble of a proof, is beneficial to all parties. But theſe reaſons are nowiſe applicable to the caſe of a royal burgh, a conſiderable market-town, or populous village, where an obligation to accommodate the pariſhioners with churches would render land itſelf a burden on the holders. Accordingly, the cuſtom there is, either to aſſeſs the landward part of the pariſh for the expence of a church neceſſary for their own occaſions, and to impoſe the remainder upon the town, or that the laſt ſhould build an ayle, or church of relief, for themſelves. All

theſe

theſe ſeveral modes have been adopted in the royal burgh of Selkirk, in the village of Saltcoats, and burgh of Paiſley. Hence too the deciſion in the caſe of the town of Kinghorn, in which the judgment indeed bears, that the court went upon the practice as to building, and upon conſent as to repairing: But that practice affords concluſive evidence of the general idea, that burghs do not contribute to this expence according to the valued rent; and the conſent would not have been given, had there exiſted a probability of a more favourable judgment.

The ſcheme ſuggeſted, of the heritors letting the ſeats, is liable to many objections. There is no court of law who could give effect to it, by obliging the heritors to let, or the pariſhioners to hire, ſeats in the pariſh-church. The benefit of a national church would thus become the ſubject of an unſeemly traffic, and the bulk of the people, inſtead of enjoying at a moderate expence the right of attending the public worſhip of God, muſt pay, for a precarious liberty of doing ſo, whatever the heritors choſe to exact.

The difficulties and injuſtice ſaid to ariſe from ſubjecting the feuers and inhabitants of the town of Crieff to any part of this burden, are purely ideal. The real rents of their reſpective properties, whether feu-holdings or tenements of houſes, can be readily aſcertained. According to theſe the proprietors will be liable in the expence of building, and in the ſame proportion they and their ſucceſſors will acquire a ſhare in the area of the church after it is built.

The Lords found, "That in the circumſtances of this caſe, the valued rent could not be the rule of affixing or apportioning the expence of building the whole church; but that the expence of building as much of the ſaid church as ſhould be neceſſary for accommodating the landward pariſh, ſhould be defrayed by the heritors according to their reſpective valued rents, and divided among them in the ſame proportion; and that the expence of the remaining part ſhould be defrayed by the feuers and proprietors of houſes, in proportion to their real rents, and divided amongſt them in the ſame proportion."

Lord *Covington*, Reporter. For the Feuers and Inhabitants, *Henry Erſkine*, *Robertſon*.
For the Heritors, *Ilay Campbell*, *Ro. Dundas*. Clerk, *Orme*.

C.

N° V. *November* 21. 1781.

COLIN CAMPBELL of Carnbeg,

AGAINST

JAMES CAMPBELL.

BILL OF EXCHANGE. *Qualified acceptance.*

DONALD CAMPBELL of Balinaby, a captain in the Argyleſhire regiment of Highlanders, being ordered upon foreign ſervice, and waiting to embark at Greenock, found himſelf unable to diſcharge ſome preſſing demands which were made upon him. James Campbell, however, agreeing to advance the money, Balinaby drew two bills in his favour upon Colin Campbell of Carnbeg, to whom he had already diſponed his whole eſtate under a power of redemption.

James ſent the bills by expreſs to Ilay, where Carnbeg reſided, and he, perceiving that his friend's ſituation would admit of no delay, immediately accepted them; but as he had no effects of the drawer in his hands, inſtead of returning them to James, he tranſmitted them to his own agent at Greenock, with orders not to deliver them, unleſs Balinaby would agree to give up his power of redemption, and, at any rate, to keep them in his hands till that gentleman *ſhould be clear away for America.* At the ſame time, he wrote to James, informing him of what he had done, and referring him to his agent for the conditions of his acceptance.

Balinaby having abſconded before the expreſs returned from Ilay, it became impoſſible to procure his conſent to the terms propoſed. The bills, however, were forced from Carnbeg's agent by a decree of the ſheriff; and being afterwards indorſed by James, the effect of acceptances *ſo qualified* came to be conſidered, in a reduction of the ſheriff's decree brought by Carnbeg, and in an action againſt him, for payment, at the inſtance of the indorſee.

Pleaded for Carnbeg: To impoſe an obligation upon a perſon without his conſent, is adverſe to the firſt principles of juſtice. Every man is entitled to chuſe whether he will oblige himſelf or not, and is at liberty to adject what conditions he pleaſes to his obligation.

That a bill, therefore, may be accepted *conditionally*, is clear; and, among merchants, nothing is more common than ſuch acceptances; Harcus, p. 68. Poſtlethwait, *voce* Acceptance; Law of Bills of Exchange, p. 30, 31. It has been equally well underſtood, ſince the point was *ſettled* by Lord Hardwicke, in the caſe of Lumly and Palmer, that a bill may be accepted *by letter*, or even *verbally*; and if ſo, a condition may, in the ſame way, be adjected to the acceptance.

When the bills in queſtion arrived at Ilay, Carnbeg was under no obligation to accept them; becauſe the ſubjects diſponed to him under reverſion being already more than exhauſted, he had no effects belonging

belonging to Balinaby in his hands. His accepting the bills, therefore, was a voluntary act: He was entitled to propoſe his conditions; and if thoſe conditions were not complied with, he had a right to with-hold his acceptance.

On the other hand, it may be admitted, that James Campbell, the holder of the bills, was not bound to take any but a ſimple unqualified acceptance; and if the terms propoſed were not agreeable to him, he might have held the bills as *refuſed*, and proteſted them for non-acceptance. But this was the fartheſt he could go; and he was not entitled to avail himſelf of the acceptance procured from Carnbeg, while at the ſame time he rejected the condition of that acceptance.

Had the parties been preſent together on this occaſion, it is evident that James Campbell muſt either have taken the acceptance qualified in the manner propoſed, or he muſt have gone without it; and although circumſtances rendered it neceſſary that Carnbeg ſhould ſign the bills as acceptor before he had an opportunity of knowing whether or not his terms would be agreed to, this makes no difference in the rights of parties. It was incumbent on James to have ſignified his diſapprobation *immediately* to Carnbeg's agent. In that caſe, he might at once have got up his bills, upon agreeing to cancel Carnbeg's ſubſcription, which every acceptor is entitled to do before the bill goes out of his poſſeſſion; Forbes on Bills, c. 5. § 13. Poſtlethwait, l. c.; and which ought to have been done here, as the holder was unwilling to take a conditional acceptance.

Anſwered for the defenders: It is not of the ſmalleſt conſequence, whether Carnbeg had value in his hands or not; for, by accepting the bills, he unqueſtionably became liable to the onerous holder of them. Carnbeg was, no doubt, at liberty to have accepted the bills, or to have refuſed them, as he pleaſed; but he had no right, without the holder's conſent, to adject *any* condition to his acceptance. But, in fact, the bills bear a *ſimple* acceptance, unqualified by any reſtraint or exception whatſoever; and ſuch acceptance, being once adhibited to a bill, cannot afterwards be either altered or revoked; Law of Bills of Exchange, p. 35. It was therefore incompetent for Carnbeg, after having accepted the bills in queſtion *ſimply*, to qualify his acceptance with the conditions contained in the letter to his agent. It was equally incompetent for James Campbell to have agreed that the acceptance ſhould be cancelled on any account. He had no right to *diſcharge* Carnbeg, who, by accepting the bills, conſtituted himſelf the *proper* debtor, and rendered Balinaby's obligation as drawer only *ſubſidiary*.

But, at any rate, Carnbeg was culpable in retaining the bills, or in directing his agent to keep poſſeſſion of them, till Balinaby ſhould be gone. He ought to have determined poſitively, either to honour or to diſhonour the draughts. Had he returned them unaccepted, James Campbell might immediately have had recourſe againſt the drawer; and, by with-holding them improperly, Carnbeg became anſwerable, even although he had not accepted.

Obſerved on the Bench: The obligation of a bond, already ſigned, may be qualified before delivery: But the acceptor of a bill is not entitled to retain it an hour, or to adject any condition to his acceptance, without the holder's conſent. It is the holder's document of debt againſt the drawer, and muſt immediately be returned to him.

The

The court adhered to the Lord Ordinary's interlocutor, " repelling " the reaſons of reduction in the action at Carnbeg's inſtance, " and decerning againſt him in that at the inſtance of the in- " dorſee."

Lord Ordinary, *Alva.* Act. *Blair* and *A. Abercromby.* Alt. *Cullen.* Clerks, *Tait* and *Home.*

L.

N° VI. *November* 27. 1781.

THOMAS HAY,

AGAINST

WILLIAM WOOD.

OBLIGATION. *If a bond, granted by a father to his daughter, as unmarried, when, without his knowledge, ſhe was married, be valid.*

CONDITION—*of not marrying without conſent,—adjected to a bond of proviſion gratuitous ſo far only as to anticipate the term of payment, —if effectual.*

HOMOLOGATION.

BY a poſtnuptial contract between William Wood and Lady Catharine Cochrane, a conſiderable ſum of money, payable at the death of the former, was ſettled on the iſſue of their marriage. Lady Catharine died in October 1776, leaving an only child, Anne Wood; to whom Mr Wood, her father, then granted a bond of proviſion; by which, " for the love and affection he bore to her, his only " daughter, he obliged himſelf to pay to her, her heirs, &c. the " ſum of L. 1000 at the firſt term of Whitſunday or Martinmas " *next after her marriage, whenever the ſame might happen,* with in- " tereſt from the term of payment; *providing always, That in caſe* " *the ſaid Anne Wood ſhould marry without his conſent, that the ſaid bond* " *ſhould be as void as if the ſame had never been granted;* and declaring " alſo, That the ſaid ſum ſhould be imputed in part of what ſhe " might be entitled to in virtue of the contract of marriage betwixt " her mother and him."——This bond, when executed, was depoſited in the hands of the Earl of Selkirk, a relation of Lady Catharine's.

Several months before the date of the bond, Anne Wood had been privately married to John Henderſon, of the iſland of Jamaica, a ſtudent of Phyſic in the Univerſity of Edinburgh; which being without

out the knowledge of her father, he, for ſome months afterwards, remained totally ignorant of that event. Upon diſcovering it, he was much diſſatisfied; but ſoon conſented to receive the young couple into his family, where they continued to live for upwards of two years; yet, in the mean time, it appeared, he made, though not judicially, frequent demands on the Earl of Selkirk, for redelivery of the bond. At length Mr Henderſon and his wife granted an aſſignation of that right to Mr Hay, as truſtee for his creditors; who, in an action againſt Mr Wood, inſiſted for payment. And, in ſupport of this action,

The purſuer *pleaded:* The condition in the bond, relative to the marriage of Anne Wood, without the conſent of her father, affords no defence againſt payment. Reſtraints upon the freedom of choice in marriage are viewed by the law with an unfavourable eye. Hence, conditions importing ſuch limitations, when they occur in bonds of proviſion by parents to children, do not receive its ſupport. In ſuch proviſions, indeed, as are altogether gratuitous, or proceed from ſtrangers, not bound by any antecedent obligation to grant them, thoſe conditions are not ineffectual; nor are they without effect, even if additional proviſions are beſtowed by a father on children who are already competently provided for, and who have begun to enjoy their portions. But the preſent caſe relates to a proviſion given by a father, and which is not additional; as it is to be imputed in extinction of the former. For though, by ſubſtituting the period of the grantee's marriage, inſtead of that of the death of the granter, the term of payment might be anticipated; yet ſuch anticipation is in no proper ſenſe gratuitous. Parents are bound by a natural obligation, to afford a ſuitable proviſion to their children when ſettling in buſineſs; or, if they are females, when entering into marriage. The latter obligation was ſtrongly enforced by the Roman law, which compelled fathers "*dotare filias;*" *l.* 19. *ff. De rit. nup.*; *l. ult. C. De dot. prom.* The condition, therefore, ought not to be effectual. At any rate, it can only be juſtly interpreted conſiſtently with a rational object, that of ſecuring a proper match for the young lady; not as an ultimate condition, but as a means to that end; Prin. of Eq. b. 1. p. 1. c. 4. art. 3. And, in fact, as her marriage was ſuitable, ſo the end has been attained.

But farther: The condition was truly impoſſible, the marriage being antecedent. Now, not only in deeds *mortis cauſa*, but in bonds of proviſion by parents to children, impoſſible as well as unlawful conditions are, by our lawyers, held *pro non adjectis;* Lord Bankton, vol. 1. p. 96.; Erſkine, p. 480. And, in the Civil law, the very caſe in queſtion is decided; *l.* 45. § 2. *ff. De leg.* 4.; *l.* 10. § 1.; *l.* 11. *pr. ff. De cond. et demonſt.*; Voet, § 28. *ad tit. ff. De cond. inſtit.* Nor can this condition be ſo extended by interpretation, as to include a prior marriage as if it had been poſterior: for it is not a ſuſpenſive one, but evidently reſolutive; and as it imports a penal irritancy, it ought to be ſtrictly interpreted.

In the laſt place: It is to be obſerved, that the defender, by receiving into, and entertaining in his family, for more than two years, his daughter and her huſband; by manifeſting a perfect reconciliation; and by having made no formal or judicial demand of the

bond itſelf from the Earl of Selkirk, with whom it was depoſited, has, *rebus ipſis et factis*, conſented to the marriage; ſo that by his ratihabition the condition has actually been implemented. And were his conduct not to have that effect, the hardſhip which would reſult from it to the creditors, who now are requiring payment of debts ariſing from loans or furniſhings into which they were thereby betrayed, is apparent.

Anſwered for the defender: In every gratuitous obligation *inter vivos*, conditions and qualities are to be ſtrictly obſerved; Dict. *voce* Condition; Stair, 17th January 1673, Rae; Stair, 13th February 1680, Buchanan; Lord Kilkerran, *voce* Condition, Mackenzie *contra* the Creditors of Kinminnity. The bond of proviſion in queſtion was a gratuitous deed: for though by a conſtitution of the Emperors Severus and Antoninus, founded on circumſtances then peculiar to the Roman empire, fathers were obliged *dotare filias;* yet in our law no ſuch obligation exiſts; Falc. 27th November 1685, Robertſon *contra* her father's Heirs. Without implement then of its condition, there could not ariſe any claim from that deed; Stair, b. 1. tit. 3. § 7.; Voet, tit. *De cond. inſtit.* § 16. If, therefore, the condition were impoſſible, as the purſuer contends, the bond muſt fall to the ground; ſince conditions in deeds *inter vivos* are diſregarded only when the granter had lain under a previous natural tie to execute thoſe deeds; Stair, *loc. cit.*; Erſkine, p. 480.; Bankton, b. 1. tit. 5. § 29. Nay, though the bond had not been gratuitous, but had conſtituted the grantee's ſole proviſion, its condition would not, as having a tendency *contra libertatem matrimonii*, be totally diſregarded. It would only be reſtricted to a rational effect.

But it would ſeem that there did not really exiſt, in this caſe, any obligation to be the ſubject of a condition. The bond was granted to a certain perſon, in certain circumſtances, when there were not in exiſtence any ſuch perſon and circumſtances. It was granted to Anne Wood, as an unmarried daughter, with a ſpecific reference to that ſtate; nor was it payable but at a term poſterior to her marriage, conſidered as a future event: yet, before the date of that deed, ſhe was the wife of Mr Henderſon. In theſe circumſtances, no right from it could accrue to her. Its object had thus no more relation to her in that ſituation than to any ſtranger. The conſent neceſſary to conſtitute an obligation, was as much wanting in the one caſe as it would have been in the other.

Even ſuppoſing it poſſible, that, in ſuch a caſe, an obligation might be conſtituted, ſtill, as it muſt have ariſen from error and deception, it would not remain effectual. Had the defender not been deceived, and by the undutiful conduct too of his daughter, he would not have granted the bond; and it were unjuſt on any occaſion, but eſpecially on this, to give effect to a mere conſequence of deceit; *l.* 72. § 6. *ff. De cond. et demonſt.* Lord Deloraine *contra* Dutcheſs of Buccleugh, 7th December 1723.

Since, then, either no obligation has exiſted, or ſuch only as the law will not countenance, it follows, that there is no room for homologation, which can only be applied to a once ſubſiſting legal obligation. Nor in fact could it be inferred from the humanity of a father, which would not ſuffer his daughter to remain unſheltered in the ſtreets; or from that delicacy which rendered him unwilling to repeat,

peat, in a judicial form, a demand for redelivery of the bond, which, in a private manner, he had frequently urged on the Noble depoſitary, with earneſtneſs and importunity.

The general opinion of the court was, That the bond had created a valid obligation, which might be homologated; though ſome of the judges maintained, that the circumſtances of the grantee not correſponding to the views of the granter, that deed was *ab initio* void.

The Lords finally found, That, by the failure of its condition, the bond had been rendered ineffectual; and, though capable of homologation, yet, in fact, as it appeared to have been redemanded from the depoſitary by the granter after his reception of his daughter and her huſband into his houſe, that, notwithſtanding this laſt circumſtance, it had not been homologated; and, therefore, "ſuſtained the "defences, and aſſoilzied the defender."

Lord *Hailes*, Reporter. Act. *Neil Ferguſon, Tait.* Alt. *Ilay Campbell, Cullen.* Clerk, *Orme.*

S.

N° VII. *November* 27. 1781.

KINLOCH,

AGAINST

OGILVIE.

PUBLIC POLICE. *Steeping Lint, how to be performed.*

OGILVIE poſſeſſed a farm watered by the burn of Kirriemuir. About fifteen yards from the bed of this rivulet, he dug pits for ſteeping flax, in the manufacture of which he traded to a conſiderable extent. Into theſe pits the water entered, and iſſued from them into the rivulet in a continued ſtream.

Mr Kinloch, a neighbouring heritor, commenced a proceſs againſt Ogilvie, before the ſheriff of the county, on account of theſe pits, upon the ſtatutes 1606, c. 13. and 1685, c. 20.; by which it is enacted, "That, in time coming, no perſon ſhall lay in lochs or run-"ning burns, any green lint, under the pain of 40 s. Scots, and a "forfeiture of the lint."

In an advocation of a judgment of the ſheriff, decerning in terms of the libel, the defender

Pleaded: In this caſe an implicit obedience has been paid to the injunction of the ſtatutes, the pits challenged not being in the bed of the rivulet, but at a conſiderable diſtance. They are, farther, preciſely conformable to a later ſtatute, 13th George I. c. 26. requiring, "That no lint or hemp ſhall be ſteeped, or watered, in any ſtanding "pool,

" pool, or in any hole or pit with ſtanding water, unleſs ſuch hole " or pit is dug near to the ſide of a running river or rivulet, from " whence the ſaid pool, hole, or pit, may be frequently ſupplied with " freſh water, under forfeiture of the lint or hemp ſo ſteeped."

Anſwered: As the water of this rivulet runs into the pits, and from thence back to the rivulet in a continued ſtream, the pits ſo conſtructed become a part of the rivulet, as much as if they had been dug in its original channel; and the ſtatute of George I. which directs the operation of ſteeping lint and hemp to be performed where the water may be frequently renewed, was nowiſe intended to repeal the former law, but to guard againſt a practice then frequent, of watering them in moſs and bog holes, and ſtanding pools, by which they were greatly damaged.

The Lords thought that perſons ſteeping lint were entitled to take water from a running ſtream for the uſe of their lint-holes, and to renew the water therein from time to time, when neceſſary; but were not entitled to divert the courſe of any part of a rivulet into a lint-hole, in the manner here followed.

They, therefore, " remitted the cauſe *ſimpliciter*."

Lord *Alva*, Reporter. Clerk, *Colquhoun*. Act. *Buchan-Hepburn, John Erſkine.* Alt. *Nairne.*

C.

N° VIII. *November* 28. 1781.

BENJAMIN BELL,

AGAINST

WILLIAM CAMPBELL.

EXECUTOR. *Competition between an arreſtment uſed by a creditor of a defunct, and an intimated aſſignation by his executor.*

UPON the death of Bryce Blair, his relict was decerned executrix, for behoof of herſelf and *the younger children.* In that character, ſhe brought an action againſt Richard Thomſon, for payment of a debt due by his predeceſſor to her huſband; and afterwards aſſigned this claim to William Campbell, in payment of an account owing to him by George Blair, the eldeſt ſon and *heir* of Bryce; and by William Blair, the ſecond ſon, as repreſenting his deceaſed brother.

Poſterior to the date of this aſſignation, Benjamin Bell raiſed a proceſs againſt the executrix, for relief of (certain) debts in which his grandfather had been bound as cautioner for Bryce Blair, and for which he was now diſtreſſed; and, upon this dependence, laid an arreſtment in the hands of Richard Thomſon. In a multiple-poinding at Thomſon's inſtance,

Pleaded

Pleaded for the arreſter: An executor is no more than a truſtee or adminiſtrator for thoſe intereſted in the executry. Confirmation does not veſt the property in his perſon. He cannot compete with a creditor of the defunct attaching any part of the eſtate; neither can he, by aſſignation, give a preference to any particular creditor; Erſkine, b. 3. tit. 9. § 42. Upon the ſame principle the executory eſtate, while *in medio*, cannot be attached for the debts of the executor, but remains open to the creditors of the defunct, who have been preferred, even without diligence, upon a ſimple ſtatement of their intereſt; 12th February 1779, John Tait *contra* David Kay.

Anſwered for the aſſignee: In a competition between aſſignations and arreſtments, they are generally underſtood to be preferable according to the dates of their intimation and execution. The aſſignation in queſtion was intimated long before Mr Bell laid on his arreſtment, and thereby the ſum in Thomſon's hands was carried beyond the reach of any future diligence.

That an executor has no power to make ſuch an aſſignation, is a doctrine not founded in the law of Scotland. Formerly the heir was conſidered to be ſo much *eadem perſona cum defuncto*, that the eſtate was *equally* ſubject to the debts of both. It is true, the act 1695, c. 41. made an alteration in the law with reſpect to moveables, as the act 1661, c. 21. had already done with reſpect to heritage, and introduced a preference in favour of the defunct's creditors. But this preference was limited to one year from his deceaſe. After that period, the creditors of the repreſentative have, as formerly, an *equal* acceſs to the moveable eſtate with the creditors of the defunct. They are preferable, each according to the diligence he uſes. If a creditor of the executor arreſts at the diſtance of thirteen months from the death of the predeceſſor, he will be preferable to the defunct's creditor not arreſting till afterwards. Whatever is equivalent to diligence, muſt have the ſame effect; and therefore an intimated aſſignation in favour of the executor's creditor, will be preferable to a poſterior arreſtment at the inſtance of the defunct's creditor, not uſed till after the year of ſtatutory preference is elapſed.

The authority of Mr Erſkine is not concluſive upon this point. He only follows the opinion of Lord Stair, founded on a miſapprehenſion of the deciſion 16th December 1674, Kilhead *contra* Irvine. There the *ratio decidendi* went upon this ground, That there was no *anterior* onerous cauſe for the aſſignation, it being in ſecurity of a bond granted by a wife, *ſtante matrimonio*, without the conſent of her huſband, and therefore null by way of exception. This circumſtance his Lordſhip had not ſufficiently attended to; and Mr Erſkine, miſled by ſo reſpectable an authority, has conſidered the deciſion as giving the defunct's creditors a preference, which was then unknown, and which continued to be ſo, till introduced in a very limited manner by the ſtatute 1695.

Upon what particular grounds the deciſion, Tait *contra* Kay, proceeded, does not appear from the report. But that caſe was materially different from the preſent. There the executrix had made no application of the executry-funds; whereas here, Mrs Blair has, by an intimated aſſignation, transferred the debt in queſtion as completely

as if ſhe herſelf had recovered it, and then paid it over to Mr Campbell.

Duplied for the arreſter: Whether the act 1695 was intended to enlarge or to limit the right of the defunct's creditors, may be doubted. It is true the arreſtment founded on was not executed within year and day of Bryce Blair's death. But the arreſter is not now competing with a creditor of the neareſt of kin, confirmed in terms of that ſtatute. The executry was veſted in the perſon of Mrs Blair, as truſtee, or as *hæritrix fiduciaria*. The intereſt of the neareſt of kin was only reſiduary; and their creditors had no title to interfere till all the creditors of the defunct had received payment.

The Lord Ordinary had found the aſſignee preferable; but the court *altered* his Lordſhip's interlocutor, and "preferred the arreſter to the ſubject *in medio*."

Lord Ordinary, *Kennet.* Clerk, *Home.* For Mr Campbell, *Croſbie.* Alt. *D. Armſtrong.*

L.

N° IX. *November* 28. 1781.

RIDDEL,

AGAINST

DALTON.

IMPLIED DISCHARGE—*of the* Jus Relictæ.

DALTON, in a poſtnuptial contract of marriage, beſtowed on Riddel his wife, in the event of her ſurviving him, a liferent of his whole effects, heritable and moveable. On the other part, *ſhe, in the event of her predeceaſe*, aſſigned to him her ſhare of the goods in communion, her *paraphernalia*, and a liferent of a houſe belonging to her, ſtipulating at the ſame time an annuity, and a ſmall ſum of money, to her next of kin.

Dalton died before his wife, and her executors after her death laid claim to the half of his moveable effects, in name of widow's part, which was no where expreſsly diſcharged in the contract of marriage.

The Lords found, "That the wife's acceptance of the proviſions "in the marriage-contract, virtually implied a renunciation of "the *jus relictæ*."

Lord Ordinary, *Braxfield.* Clerk, *Home.* Act. *Croſbie, Rolland.* Alt. *Ilay Campbell, H. Erſkine.*

C.

N° X.

N° X. *December* 5. 1781.

WILLIAM ROSE,

AGAINST

Sir LUDOVICK GRANT, and others.

EXHIBITION. *If the crown's donatary to chaplain-duties be entitled to production of the title-deeds of the lands liable to the duties.*

ROSE having obtained from his Majeſty a liferent-grant of the duties and revenues which had belonged to certain chaplainries ſituated in ſeveral of the northern dioceſes of Scotland, and which at the Reformation fell to the crown, brought an action againſt Sir Ludovick Grant, and other proprietors of lands holding of theſe chaplainries, for payment of the arrears of the duties, and for exhibition of the charters containing the lands ſubject to them, in order that the amount might be aſcertained.

Pleaded for the defenders: It is a rule of law, *Quod nemo tenetur inſtrumenta edere contra ſe*; Haddington, 10th February 1623, Monteith. Though this rule ſo far admits an exception, that a vaſſal may be compelled by his ſuperior to exhibit his titles; yet as this can be done only in a proceſs of reduction-improbation, Stair, b. 2. tit. 11. § 33.; Erſkine, b. 2. tit. 5. § 3.; the preſent caſe being a ſimple action of debt, falls not within that exception. Nor is the crown itſelf to be diſtinguiſhed in this reſpect from other ſuperiors; much leſs the purſuer, its donatary, poſſeſſed of nothing more than a mere perſonal aſſignment to the duties claimed.

But were ſuch a compulſatory competent, the law would yet never authoriſe a *general* exhibition of writings. On the contrary, thoſe which are called for muſt be particularly ſpecified or deſcribed; Erſkine, b. 4. tit. 1. § 52. A juſt jealouſy is entertained of the tendency of an unlimited acceſs to the charter-cheſts, or of an uncontrolled inſpection of the title-deeds of parties; Clerk Home, 8th July 1737, Scot *contra* Lord Napier; Hamilton of Dalziel *contra* Hamilton; Duke Hamilton and Lord Selkirk *contra* Douglas.

Anſwered: An action for exhibition merely, is competent to ſuperiors; Stair, b. 3. tit. 5. § 49.; Erſkine, b. 2. tit. 5. § 3. Nay, ſuch a production as that now claimed, is enjoined even by act of parliament 1592, c. 133.

The court adhered to the interlocutor of the Lord Ordinary, which was as follows: "As the exhibition required ſtands confined "to ſuch of the defenders charters of land as fall under the "purſuer's grant, the *Reddendos* of which ſpecify certain chap- "lainry, feu, and other duties payable out of their reſpective "lands; and the Lord Ordinary being of opinion, that this ex- "hibition could not be diſputed in an action at the crown's in- "ſtance

" ſtance for payment of thoſe duties, and proof of the extent " thereof, and that the ſame remedy muſt be competent to the " ſame purpoſe and effect when purſued at the inſtance of the " crown's donatary and grantee; ordains the defenders to exhi- " bit upon oath all the charters in their cuſtody which contain " the lands liable in the ſaid chaplain-duties, and make mention " thereof in the *Reddendo*."

Lord Ordinary, *Covington*. Act. *J. Swinton*. Alt. *D. Rae, Ilay Campbell*. Clerk, *Home*.

S.

N° XI. *December* 8. 1781.

SINCLAIR and DOULL,

AGAINST

Earl of CAITHNESS and INNES.

ADJUDICATION. *How effectual, in terms of the act* 1661, *when led upon the perſonal obligation in an heritable bond; when reſtricted to a ſecurity; and when, being led againſt the anceſtor, it ſtands in oppoſition to others led againſt the heir for the anceſtor's debt.*

SINCLAIR of Aſſery, in the year 1761, granted an heritable bond and infeftment over his eſtate to Innes of Sandſide; who, in the year 1770, led an adjudication, which was afterwards made effectual by a charge againſt the ſuperior, for the principal ſum, and for the annualrents and penalties incurred ſince the conſtitution of his ſecurity.

Aſſery died in the year 1771, and his ſon made up titles to the eſtate by precept of *clare* and infeftment. In 1774, Sinclair of Stempſter, and Patrick Doull, creditors of old Aſſery, led adjudications; and, within a year after them, the Earl of Caithneſs, and Innes of Scotſcalder, likewiſe adjudged for debts due by old Aſſery.

A ranking and ſale of the creditors and eſtate of Aſſery having been commenced, Mr Innes of Sandſide's adjudication, on account of a trifling *pluris petitio*, was reſtricted to a ſecurity for the principal ſums, annualrents and neceſſary expences, accumulate at the date of the adjudication.

A ſtate of the intereſts produced in the ranking was then made up; in which Sandſide being the firſt effectual adjudger, was ranked in the firſt place: And as none of the ſubſequent adjudgers were within a year of him, they were ranked, one after another, according to the dates of their adjudications. By this mode of ranking, the Earl of Caithneſs, and Innes of Scotſcalder, could draw nothing till Stempſter and Doull were paid; whereas, if they could in any manner remove Sandſide's adjudication from being the firſt effectual one, thoſe of Stempſter and Doull would occupy that place, and theirs being within a year after, would be entitled to a *pari paſſu* preference.

ference. For this purpoſe, ſeveral objections were ſtated to Sandſide's adjudication. It was, 1*mo*, urged, That being deduced on an heritable debt, it was exempted from the operation of the ſtatute 1661; and it was

Pleaded: The enactment 1661, c. 62. introducing a parity of preference in adjudications led before or within a year of the firſt effectual one, has excepted "ground-annuals, annualrents due upon an "infeftment, and other real debts, and *debita fundi*, and compriſings "following thereon." Adjudications for debts of this nature are in every reſpect ſituated as they were before this act: they can neither be ranked *pari paſſu* with other adjudications, nor have any effect in regulating their preferences.

Anſwered: The exception occurring in the ſtatute with regard to appriſings for real debts, was ſolely intended to preſerve the preference due to ſuch by virtue of their infeftments, and does not in any other way impinge on its effects. Nor could this exception, though of the extent pleaded for by the objectors, create any alteration in this ranking. Here the adjudication is led upon the perſonal obligement preceding the infeftment in ſecurity. No concluſion is drawn, or effect given to it, on account of the collateral real right. The creditor will indeed obtain a preference for a part of his claim in conſequence of his infeftment; and as he cannot draw his payment twice, his adjudication will operate only to ſecure the reſidue; but to this extent his adjudication is ſtrictly perſonal, and endued with all the qualities peculiar to ſuch a right.

It was, 2*do*, objected to Sandſide's adjudication, That, being reſtricted to a ſecurity, it could not be the firſt effectual adjudication; and it was

Pleaded: An adjudication, deduced for more than what was due, or defective in any other eſſential reſpect, is *funditus* void and null: And although this court has been in uſe to ſuſtain ſuch as a ſecurity, where the defect is only in the form of the diligences, or has ariſen from a trifling error as to the amount of the debt; yet in this its transformed ſtate, it muſt be deſtitute of the nature, and loſe all the effects of an adjudication. It is accordingly held, that an adjudication, thus reſtricted, can, by no lapſe of time, be converted into an abſolute right of property; nor can the creditor in it obtain a declarator of expired legal. It is merely equivalent to a bond of corroboration ſecured on land, and ought to be attended with no other effect in the preſent caſe.

Anſwered: The expreſſion uſed to ſpecify the effects of an adjudication reſtricted to a leſſer ſum than the decreet of adjudication authoriſed the creditor to draw, does not alter its nature, nor convert it into a different ſpecies of ſecurity. It is ſtill an adjudication; and the creditor will draw the reſtricted ſums; and his diligence, in every other reſpect, will be equally complete, as if it had been originally led for thoſe ſums; with this only exception, that the debtor is relieved from the penal conſequences of an expired legal.

It was, 3*tio*, objected, That Sandſide's adjudication having been led againſt the anceſtor, could not regulate the preference of thoſe led againſt the heir; and it was

Pleaded: The ſtatute 1661 not only ſuppoſes an eſtate which is attached by various creditors, but alſo a *common* debtor againſt whom all the adjudications entitled to an equal preference by this act are led. The effect of the ſtatute is deſcribed to be the ſame "as if one "adjudication had been led for the whole of the reſpective ſums con-"tained in the adjudications equally preferable by virtue of this act." Here the party againſt whom Sandſide's adjudication was led, and he againſt whom Stempſter and Doull's adjudications were deduced, are totally diſtinct; and it is impoſſible to ſuppoſe that the different adjudications could be contained in one. Indeed, were the eſtate alone conſidered in a ranking, as preſcribed by this act, very ſingular conſequences muſt enſue. Where a proprietor, whoſe lands had been adjudged, ſold his eſtate to another, the purchaſer's creditors adjudging the eſtate within a year after the creditors of the ſeller, would be entitled to a *pari paſſu* preference. Or if we ſuppoſe an ineffectual adjudication to have been led againſt an anceſtor, and afterwards another againſt the heir, for his proper debts, the laſt would in like manner enjoy the benefit of this act. Nor can the ſuppoſed identity between the anceſtor and the heir make any diſtinction in this caſe. An heir, by the law of Scotland, may, by his deeds, incur a paſſive repreſentation; and, to the effect of being liable to the anceſtor's creditors, become *eadem perſona cum defuncto:* But ſuch deeds can create no connection between him and his predeceſſor's eſtate, which muſt be tranſmitted, according to feudal rules, with the concurrence of the ſuperior; and although, by particular enactments, certain forms of law have been, for the benefit of creditors, made equivalent to a ſervice, yet no *active* right is thereby conveyed to the heir in the property of the eſtate.

Neither is it new, that there ſhould, in this manner, be two claſſes of equally preferable adjudications affecting the ſame eſtate. In the caſes already put, the adjudications againſt the author, or anceſtor, cannot regulate the ranking of the creditors of the ſingular ſucceſſor or heir. The laſt could only attach the eſtate as it ſtood in their debtor, incumbered with one or more adjudications againſt the author or anceſtor, which will be conſidered in the ranking as ſo many heritable ſecurities affecting the ſubject of the competition. In the ſame manner, the ſubject of the preſent ranking muſt be viewed as an eſtate veſted in the heir, incumbered with the adjudications againſt the predeceſſor; and the ſtate ſo incumbered, muſt be divided among the competitors according to the ordinary rules of preference.

Without this interpretation, the preſent ſtatute muſt be exceedingly defective. No proviſion is made for a caſe, which might frequently occur, of a debtor dying within the year, or perhaps a day, after adjudications have been made effectual againſt his eſtate. By this event, on account of the *annus deliberandi*, his other creditors muſt, without any fault on their part, and from their confidence in the efficacy of the preſent ſtatute, be precluded from every benefit ariſing from thence. This certainly would have been guarded againſt, if the legiſlature had intended, that the firſt effectual adjudi-

cation

cation againſt the anceſtor ſhould be the leading diligence in the ranking of thoſe led againſt the heir.

Anſwered: The ſtatute 1661 has introduced no new rule of preference, nor altered in any manner thoſe which were formerly eſtabliſhed. At that period, it was in the power of a creditor, more rigorous, or better acquainted with the debtor's ſituation, by precipitant meaſures, to get the ſtart of his competitors; a circumſtance which, while it rendered the ſecurity of creditors exceedingly precarious, had a correſponding effect on the ſituation of the debtor. To remove this was the object of the preſent enactment, by creating a parity of preference, under certain reſtrictions, among adjudications which differed in nothing but in date, and where nothing hindered their being included in the ſame decreet, but that the creditors in ſome had been more induſtrious than others in bringing forward their diligence. Hence thoſe adjudications, which prior to this period could never be led at the ſame time, nor be included in one decreet, are not in the leaſt degree affected by it. Of this nature are the examples adduced on the other ſide, where adjudications have been led againſt an author, and thereafter others againſt the ſingular ſucceſſor; or where, after adjudications led againſt the predeceſſor, others have been led againſt the heir for his proper debt. There the ſingular ſucceſſor, or heir, could carry nothing by their purchaſe or ſervice, but the right of reverſion competent to their reſpective authors; and their creditors, who by diligence ſubſtitute themſelves in their place, muſt be in the ſame ſituation.

Such inſtances, however, are to be carefully diſtinguiſhed from the preſent, where one adjudication is deduced againſt the anceſtor, and another againſt the heir for the anceſtor's debts. Here not only the ſubject of the ranking, but alſo the debtor, is the ſame, ſince the heir, whether having made up titles in the direct way by ſervice, or by fiction of law, through the *media* introduced by the ſtatutes 1540 and 1621, is as to the creditors of the anceſtor the ſame perſon with the anceſtor. Hence it does not admit of a doubt, that an adjudger againſt the anceſtor, whoſe diligence has not been made effectual, in terms of this ſtatute, during the anceſtor's life, would come in *pari paſſu* with the firſt effectual adjudger againſt the heir for the anceſtor's debt. And upon the ſame principle, where an effectual adjudication has been led againſt the anceſtor, that muſt be the leading diligence in the ranking of his creditor, and upon his eſtate. The inconveniency which might ariſe in the particular caſe of a debtor dying immediately after his eſtate is carried off by an effectual adjudication, can rarely happen, and ſeems to have been overlooked by the ſtatute. If it occurred, it might be rectified, by allowing the diligence of the other creditors to proceed within the year, in the ſame manner as where the heir in favour of particular creditors has renounced the benefit of the *annus deliberandi;* Erſkine, b. 3. tit. 8. § 55. At all events, this defect, ſuppoſing it incorrigible, cannot prevent the effects of the ſtatute in caſes equally within its letter and ſpirit.

The firſt two objections were unanimouſly repelled by the court; who, though, ſome of the judges expreſſed doubts as to the efficacy

cacy of the laſt, adhered to the Lord Ordinary's interlocutor, finding, " That Sandſide's adjudication was to be conſidered as " the firſt effectual."

Lord Ordinary, *Manboddo.* For the Objectors, *Ilay Campbell, Croſbie.* and Doull, *Rae, Maclaurin.* For Stempſter Clerk, *Menzies.*

C.

N. B. All the judges who ſpoke, declared their opinion, That a creditor, in danger of loſing his preference, by the death of his debtor, after an effectual adjudication had been led by another creditor, would obtain relief in the way ſuggeſted by the reſpondents.

N° XII. *December* 11. 1781.

ROBERT CAMPBELL of Downie,

AGAINST

JAMES CAMPBELL of Silvercraigs.

COMPENSATION *and* RETENTION. *If a truſtee be entitled to retention for his own debt.*

CAMPBELL of Aſkniſh, and Campbell of Silvercraigs, as truſtees for Archibald Campbell of Danna, ſold the eſtate of the laſt, which was burdened with the payment of certain annuities.

Silvercraigs was himſelf a creditor of Danna, and prevailed upon the purchaſer to pay to him, and Aſkniſh, the other truſtee, that part of the price which he might have retained as the ſtock correſponding to the annuities. For this, without mention of their character as truſtees, they granted to him a bond, obliging themſelves and their heirs to indemnify him from theſe annuities.

On the death of one of the annuitants, Robert Campbell of Downie, likewiſe a creditor of Danna, laid arreſtments in the hands of Aſkniſh and Silvercraigs, the truſtees. In a proceſs of multiple-poinding which followed, a competition aroſe betwixt this arreſting creditor and Silvercraigs, who acknowledged, that he was poſſeſſed of the whole ſum paid to him and Aſkniſh; but inſiſted, that he was entitled to retain the ſtock of the annuity which had fallen for payment of the debt due to himſelf; and, in ſupport of this claim,

Pleaded: It is a point *triti juris*, That an arreſtee who is likewiſe a creditor, is entitled to retain payment of his own debt. This privilege obtains in every caſe; wherein, as in the preſent, the ſum arreſted has been lawfully and *bona fide* acquired; Bankton, b. 1. tit. 24. § 35. Nor, on this occaſion, can it be precluded by the character of truſtee. *Officium nemini debet eſſe damnoſum.* A factor is entitled to a more extenſive retention; Erſkine, b. 3. tit. 4. § 21.

Anſwered:

Anſwered for the arreſter: The ſum in queſtion being a depoſite in the hands of the truſtees, is not a ſubject of retention; Erſkine, b. 3. tit. 4. § 17.

The Court adhered to the Lord Ordinary's interlocutor, finding, "That the ſum *in medio* was in Silvercraig's hands merely in the "character of one of the truſtees of Danna; and that he had no "right of retention or preference therein."

Lord Ordinary, *Monboddo.* For Arreſter, *G. Ferguſſon.* For Truſtees, *Rolland.*
Clerk, *Menzies.*

S.

N° XIII. *December* 12. 1781.

PORTEOUS,

AGAINST

ISAT, and others.

REPARATION. *Verbal injury,—how committed,—alleviated.*

ISAT, and others, reſiding in the pariſh of Gorbals, preſented to the Preſbytery of Glaſgow, a libel againſt Mr Anderſon, their miniſter, charging him with adultery, and other crimes. The Preſbytery having allowed a proof, the Synod affirmed their judgment; and Mr Anderſon appealed to the General Aſſembly.

Mr Porteous, one of the miniſters of Glaſgow, concurred with Mr Anderſon in this appeal, and ſupported it at the bar of the General Aſſembly. He there deſcribed Mr Iſat as a man of mean origin, and of a violent and factious ſpirit; attributed his proſecution of Mr Anderſon to the moſt unworthy motives; and accuſed him, and his adherents, of having, in the courſe of the diſpute, endeavoured, by ſuborning witneſſes, and other unlawful means, to bring Mr Anderſon to infamy and ruin.

The ſpeech pronounced by Mr Porteous on this occaſion was inſerted, with his approbation and aſſiſtance, in one of the newſpapers at Edinburgh, and in another at Glaſgow. Mr Iſat, and his aſſociates, retorted in another Glaſgow newſpaper, accuſing Mr Porteous, in very groſs terms, of many falſehoods and calumnies in his management of the appeal; and threatening, "that he might ſoon ex-"pect a publication in which his own *tête-a-têtes* would be intro-"duced."

This performance Mr Porteous made the foundation of a proceſs of damages in the Court of Seſſion, concluding for L. 1000 Sterling.

Obſerved on the Bench: Mr Porteous is not anſwerable for any expreſſions uſed by him in his character of appellant, relative to the queſtion before the Aſſembly, and ſuggeſted by the evidence under their conſideration. But the encouragement and aſſiſtance given to the repetition of the ſame expreſſions in the newſpapers, or other ſimilar publications, being no wiſe connected with that character, and having an obvious tendency to vilify and injure his opponents was undoubtedly actionable. Had the other party, therefore, confined themſelves within the limits of a moderate retaliation, the mutual injuries would have compenſated each other. But an inſinuation of a charge of incontinency againſt Mr Porteous, a clergyman, and married perſon, cannot be juſtified on this principle.

The interlocutor was in theſe words: "Find, That the purſuer, "Mr Porteous, acted improperly in giving his notes, or otherwiſe "aſſiſting the editors of the Edinburgh Caledonian Mercury, in pu- "bliſhing his ſpeech before the General Aſſembly, in the cauſe of "Mr Anderſon, in ſaid newſpapers, and alſo afterwards in the Glaſ- "gow Mercury: Find, That Mr Iſat, and the other defenders, acted "more improperly, by their virulent and acrimonious paper pu- "bliſhed in the Glaſgow Journal, highly injurious to the character "of the purſuer; and therefore find the defenders, conjunctly and "ſeverally, liable in damages: but as the conduct of the purſuer, "above mentioned, was ſuch as to exculpate and alleviate the con- "duct of the defenders in part, *they* modify the ſaid damages to L. 5 "Sterling; and find them, conjunctly and ſeverally, liable in ex- "pence of proceſs," &c.

A reclaiming petition was offered for the defenders; in which they argued, That the queſtion before the Aſſembly regarding merely the relevancy of the libel, Mr Porteous acted *injuriouſly* by introducing the character and conduct of the libellers, which could have no influence in the deciſion. But it appeared to be the practice of the eccleſiaſtical judicatories, in accuſations againſt members of the Church, to enquire into "the origin and movers thereof;" and that Mr Porteous was therefore juſtified in inſiſting on theſe topics, ſo far as they had *any* foundation in evidence before the Aſſembly.

"The Lords therefore adhered."

Lord Reporter, *Gardenſton.* Act. *Croſbie, Craig, Morthland* and *Arch. Campbell.*
Alt. *Ilay Campbell, Cullen.* Clerk, *Campbell.*

C.

N° XIV.

N° XIV. *December* 14. 1781.

WILLEM t'HART Maſter, and Meſſrs CLASS JAAN en ZOONEN, Owners of the Ship Noord Holland,

AGAINST

Captain DAVID COLLINS, of his Majeſty's armed Ship Alfred, and others.

PRIZE. BONA FIDES,—*and ignorance of hoſtilities,—if grounds for liberating from Capture.*

ON the breaking out of the preſent war with Holland, his Majeſty iſſued a proclamation, containing an order for general repriſals againſt all ſhips and goods belonging to the States-General, or to their ſubjects; with the *exception* of ſuch ſhips as were then in any of his Majeſty's ports.

Before the date of this proclamation, and when hoſtilities between the powers had not yet commenced, a Dutch veſſel, freighted under charter-party, by certain merchants in Glaſgow, to carry a cargo of flour from Leith to St Euſtatia, had proceeded on her voyage to the former port. The veſſel, however, did not, until ſeveral days poſterior to the proclamation, arrive in the Frith of Forth, where ſhe was ſeized as a prize.

The legality of this capture came to be tried before the High Court of Admiralty; and the Judge-Admiral pronounced a ſentence, "declaring the ſhip no lawful prize." His judgment having been brought under the review of the Court of Seſſion, by bill of ſuſpenſion, it was

Pleaded for the Dutch maſter and owners: The contract of affreightment, in the circumſtances which exiſted when it was formed, was in every reſpect lawful and right. The two nations were then at peace with each other; nor was the approaching rupture foreſeen. In the ſame circumſtances, the Dutch owners, *bona fide*, and in the juſt expectation of reciprocal performance on the part of the freighters, ſo far fulfilled their engagements as to ſend their veſſel to the port of Leith. Their whole conduct in this matter was juſt and proper. Had they acted in a different manner, they would have been guilty of a moral wrong. Thoſe on board, too, having come to the knowledge of the war, which had intervened between the ſailing of the veſſel and her capture, by the latter event alone, acted a part equally unexceptionable.

As thoſe foreigners, therefore, fulfilled their lawful engagements, the law of this kingdom would have exacted from the freighters the juſt and complete performance alſo of theirs. That were the leaſt thing due to the good faith ſubſiſting among nations. Is it to be conceived then, that the ſame law will authoriſe an advantage to be taken of a ſituation into which this good faith alone, and confidence in

in the people of this country, have brought thoſe ſtrangers, to the effect of bereaving them of their property, by a ſeizure of the veſſel in queſtion? The law of nations reprobates ſuch an idea; Burlamaqui, part 4. chap. 13. § 4. 8.; Vattelle, b. 2. chap. 18. Nor can an interpretation, ſo adverſe to its maxims, be put on a proclamation which declares itſelf to proceed upon principles "conſonant to good "faith."

In conformity to this declaration, the preſent caſe will fall properly under the exception of veſſels already in our ports. Theſe are excepted, becauſe *bona fide* placed under the command of Britiſh ſubjects; and this veſſel, previouſly to the date of the proclamation, was delivered into the cuſtody of Britiſh ſubjects, or at leaſt into that of perſons maintaining poſſeſſion of her on their account.

Anſwered: The words of the royal proclamation being clear and expreſs, judges are not at liberty to interpret it in ſuch a manner as to violate its plain import. Nor is it unjuſt, that the *exception* in the ſtatute does not extend to the caſe in queſtion. It is not denied, that the faith of contracts is to be preſerved; but the acts of individuals are to give place to the neceſſities of the ſtate. Theſe may juſtly render performance impoſſible by private parties; and it is with a tacit or explicit reference to ſuch events, that all civil engagements are formed. The obligation upon the freighters has come to an end, and the ſtate has ſeized a lawful prize in war.

The Lords ſeemed to be moved by the *bona fides* of the Dutch owners, and by the confidence which they had placed in our merchants who freighted the veſſel: They therefore refuſed the bill of ſuſpenſion, affirming the judgment of the admiral, which was the following: "Having conſidered his Majeſty's order in council, of date the "20th December 1780, that general repriſals be granted againſt the "ſhips, goods, and ſubjects of the States-General of the United Pro"vinces; and his Majeſty's other order in council, of the 22d of "December laſt, relative to ſhips and cargoes belonging to the ſub"jects of the States-General; as alſo his Majeſty's other order in "council, of date the 16th February laſt 1781, alſo relative to the "ſhips and cargoes belonging to the ſubjects of the States-General; "and having conſidered the whole circumſtances of this caſe, finds, "That in the preſent caſe there are juſt and equitable grounds for "finding, that the ſhip libelled, called the *Noord Holland of Amſter*"*dam*, and her cargo, are not lawful prize; and that the ſaid ſhip "and her cargo ought to be reſtored to the ſaid William Hart, de"fender, for his own behoof, and that of the owners of the ſaid ſhip "and cargo: and therefore finds and declares, That the ſaid ſhip and "her cargo are not lawful prize; and ordains the ſaid ſhip and her "whole pertinents, as they ſtand at preſent, as alſo the whole of her "cargo, &c. remaining, as it ſtands at preſent, to be forthwith re"ſtored and delivered up to the ſaid William Hart, defender, for his "own behoof, and that of the owners of the ſaid ſhip and cargo."

Reporter, Lord *Gardenſton.* For the Dutch owners, *Morthland.*
For the Captors, Solicitor-General *Murray, Ilay Campbell, Rollana.*

S.

N° XV.

N° XV. *December* 20. 1781.

Sir CHARLES PRESTON,

AGAINST

The Earl of DUNDONALD.

SUPERIOR and VASSAL.—*Clauſe* de non alienando.

IMPLIED OBLIGATION,—*on the Granter of a perſonal bond, relative to land.*

REGISTRATION,—*Right of Pre-emption, capable of.*

IN 1745, Sir George Preſton feued out a ſmall piece of ground to Mr Cochrane of Culroſs, *abſolutely* and *irredeemably*. In 1750 Mr Cochrane, by bond, obliged himſelf and his heirs, "that, whenever he "or they ſhould think fit to diſpoſe of this ſubject, they ſhould offer "it to Sir George, or his heirs, for the ſum of L. 307: 13: 4 Ster-"ling."

The eſtate of Culroſs, together with this pendicle, upon the demiſe of Mr Cochrane, devolved to the Earl of Dundonald; and his affairs having gone into diſorder, Sir Charles Preſton, ſon and heir of Sir George, commenced different proceſſes for making the above-mentioned obligation effectual. They concluded for having it declared, "1*mo*, That the lands had been in non-entry ſince the death of Mr "Cochrane: 2*do*, That the Earl of Dundonald, as his repreſentative, "and his ſucceſſors legal and voluntary, were obliged to make up "titles thereto, ſo as to make this right of pre-emption effectual a-"gainſt ſingular ſucceſſors, by inſerting it in their charters and infeft-"ments: And, 3*tio*, That the Earl of Dundonald and his foreſaids were "obliged to ſubſcribe a new deed *verbatim*, in terms of the obligation "ſued on, with the clauſes proper for enabling the purſuer to regi-"ſtrate the ſame in the regiſter of reverſions, within ſixty days from "its date, according to the preſcription of the ſtatute 1617, c. 17."

Againſt the two laſt concluſions the Earl

Pleaded: 1*mo*, This obligation tying down the vaſſal to ſell his lands at a definite price, which in courſe of time muſt be greatly below their true value, in effect imports the clauſe *De non alienando ſine conſenſu ſuperioris*, which is prohibited by ſtatute 20th George II.

Anſwered: Clauſes of pre-emption, by which the ſuperior is entitled to the firſt offer of the lands when the vaſſal is inclined to diſpoſe of them, do not fall under this enactment; Erſkine, b. 2. tit. 5. § 28.

Pleaded: 2*do*, The ſuperior is obliged to renew the inveſtitures in the preciſe terms of the former one; Dict. of Dec. vol. 2. p. 410.

Anſwered: This general rule ſuffers an exception in all caſes where, ſince the laſt infeftment, any agreement has taken place between the

ſuperior and vaſſal relative to the feu, which, in order to its completion, requires to be inſerted in the infeftment. In ſuch caſes, the ſuperior is not obliged to renew the inveſtiture, nor the vaſſal to accept a renewal, unleſs ſuch agreement is made part thereof.

Pleaded: 3*tio*, Where parties have entered into a covenant complete *in ſuo genere*, the debtor is not bound to make the creditor's ſecurity broader than was originally ſtipulated; nor to convert a perſonal obligation into a real burden. A creditor in a perſonal bond, when the term of payment or performance arrives, may adjudge, or, by inhibition, he may prevent his debtor from voluntary alienations of his landed property. In caſes of neceſſity, and where the obligation is not yet exigible, this court allows adjudications in ſecurity; but there is no form known in law by which the creditor can inſiſt that the debtor ſhall grant heritable ſecurity. The effect of ſuch form would be, to change the nature and properties of contracts, which is far beyond the powers of any judicatory.

Nor can it give any force to the purſuer's plea, that the defender counteracting his obligation by a voluntary ſale, will ſubject himſelf in damages, and therefore can have no intereſt to oppoſe it. The bond in queſtion poſſeſſes this quality in common with all obligations *ad factum præſtandum;* yet it never was pretended, that a debtor in that ſort of obligation, was bound to ſubmit to his property being ſequeſtrated, or otherwiſe ſo limited that he ſhould always be in a capacity of ſpecifically implementing his contract. In all ſuch caſes the rule is, "*Locum facti impræſtabilis ſubit damnum et intereſſe.*" This too is the natural reſult of all *negative* obligations, where a perſon is taken bound to forbear a certain act. To give one noted inſtance: There are many entails where the prohibitions againſt ſelling the eſtate, although binding upon the heir, are unavailing againſt his onerous creditors. By contracting debt, for which the eſtate is evicted, or by ſelling it, the heir in ſuch circumſtances ſubjects himſelf to an action of damages at the ſuit of the ſubſtitutes. But was it ever heard, that theſe ſubſtitutes could demand, that the deed of entail ſhould be completed in ſuch a manner as to preclude the heir in poſſeſſion from infringing the conditions on which he holds the eſtate?

Further, The inſertion of this bond in the vaſſal's infeftments, could neither prevent a voluntary nor a judicial ſale of the eſtate. It is only by means of prohibitory, irritant, and reſolutive clauſes, that the commerce of land can be reſtrained, in excluſion of onerous purchaſers; Erſkine, *loc. ſup. cit.* Hence it was found, 4th January 1757, Sir William Stirling *contra* Johnſton, that an obligation in a feu-charter to offer the lands to the ſuperior at a certain price, although fortified by a claim irritating the right of a purchaſer, was ineffectual againſt the vaſſal's ſingular ſucceſſor.

Anſwered: Where-ever a perſon grants a right, or ſubjects himſelf to a ſtipulation, there is an *implied* obligation to execute every legal form which is neceſſary to make ſuch right complete and effectual *in ſuo genere*. Hence "lands being wadſet under reverſion, and the in-"feftment public, although there was no obligation to reſign upon an "order of redemption, the wadſetter was found obliged to ſubſcribe a "procuratory and reſignation, this being implied as a neceſſary conſe-"quence of the grant of redemption;" Dict. of Dec. *voce* Implied Obligation.

Obligation. Upon the ſame principle, where a perſonal obligation has a reference to land, the ſubject-matter of the contract naturally calls upon the debtor to complete it in ſuch a manner as to render it effectual againſt the eſtate. Thus, where a proprietor of lands, after entering into a minute of ſale, refuſes to execute the deeds requiſite for transferring the property; or where a huſband, in a marriage-contract, has become bound to ſecure his wife's jointure upon lands, and declines or has neglected to do ſo, action is ſuſtained againſt him or his repreſentatives for fulfilling the obligation. The intention of the contracting parties in this caſe, was ſurely not to create a claim of damages againſt the feuer or his heirs contravening the obligation, but to give the ſeller an opportunity of repurchaſing his property whenever Mr Cochrane or his repreſentatives inclined to diſpoſe of it. Had this meaning of the parties been properly carried into execution, this obligation would have been formed in ſuch a way as would have rendered it effectual againſt the eſtate. The defender, therefore, ought to be obliged to follow out what was really in the view of the parties, by concurring in the meaſures here inſiſted for.

In entails, clauſes irritant and reſolutive are neceſſary, by ſtatute, to enable the ſubſtitutes to make up titles to the eſtate without repreſenting the perſon contravening: But, at common law, every lawful condition may be inſerted by a ſuperior in infeftments granted to his vaſſal; and, without any ſuch clauſes, will be effectual againſt all the world. In the caſe quoted, the ſuperior did not, in the manner here adopted, inſiſt againſt the vaſſal for perfecting his right of pre-emption; but, in virtue of the obligation in the feu-charter, but which was not to be found in the infeftment, refuſed to admit the vaſſal's ſingular ſucceſſor.

Pleaded: 4*to*, This obligation can receive no ſupport from the ſtatute 1617. About that period, loans of money were entered into in the form of wadſets in this manner: The creditor got an abſolute conveyance to the property of his debtor, containing, at the ſame time, a clauſe enabling him to call for his money; and the debtor, by a bond apart, was entitled to redeem upon payment of the money advanced. Theſe bonds of reverſion, of their nature *perſonal*, were made *real*, by ſtatute 1469; and the legiſlature, for the ſecurity of third parties, required their publication in a record, by the ſtatute 1617. But the right here granted has no ſort of affinity to theſe reverſions. By it a perſon, not proprietor, ſtipulates, in a particular event, and which may never happen, the firſt offer in the ſale of a ſubject. The purſuer has no option to redeem; neither is it in the power of the defender, as in the caſe of a wadſetter, to call for his money.

At any rate, a debtor is not obliged to reſtore his creditor againſt the effects of his own negligence. An acceptor of a bill, in order to entitle the holder to ſummary diligence, cannot be compelled, after the ſix months, to renew the document of debt. If the purſuer has allowed his right of pre-emption to loſe its privileges againſt ſingular ſucceſſors, he has himſelf to blame. This alternative too, equally with the former, would be of no avail againſt onerous purchaſers.

Anſwered: It ſurely will not deprive a former proprietor of the benefit of the ſtatute 1469, that his right of reverſion is not abſolute

and

and unconditional, but depending on a certain event. If, then, the obligation ſued on is within the ſanction of the ſtatute, the demand here made is not only ſupported by the principles laid down in the third branch of the argument, but is likewiſe juſtified by numberleſs precedents in this court. Thus, before the ſtatute 1693, allowing regiſtrations after the death of the debtor, actions of regiſtration were in daily uſe; and, at preſent, where ſolemn deeds, as inſtruments of ſeiſin, have been loſt, action is always ſuſtained againſt the granters for a renewal of them, in the preciſe terms of thoſe amiſſing.

The Lords had no doubt of the irrelevancy of the two firſt defences. By their firſt interlocutor, they ſuſtained the two laſt; but, upon adviſing a reclaiming petition, with anſwers, they found, "That the tenor of the backbond in queſtion ought to "be inſerted in all the ſubſequent titles and inveſtitures of this "piece of ground."

N. B. The Lords were alſo of opinion, that the third concluſion was well founded; but the deciſion in favour of the purſuer, on the ſecond, made a decerniture on that ground unneceſſary.

Lord Ordinary, *Alva.* Act. *Blair, Maconochie.* Alt. *Rae.* Clerk, *Orme.*

C.

N° XVI. *December* 20. 1781.

JANET MACINNES, Widow of Captain Fairbairn of the 62d Regiment of Foot,

AGAINST

ALEXANDER MORE, Son of Gilbert More, Merchant and Manufacturer in Aberdeen.

PROOF. *If a written acknowledgment of marriage may be defeated by judicial declaration of the party who made it, certain collateral circumſtances concurring.*

IN conſequence of an intercourſe which had taken place between Alexander More and Janet Macinnes, the former being only in the twenty-fourth year of his age, while the latter was in the thirty-ſeventh of hers, the lady fell with child. Her ſituation having been diſcovered by ſome of her relations, who intereſted themſelves in her behalf, one of them, in particular, a Captain Grant, furniſhed her with a draught of a letter, containing an acknowledgment of marriage, which was copied over, and ſubſcribed by More, as follows: "Mrs Fairbairn, *I hereby acknowledge, that you* "*are my lawful wife;* and you may, from this date, uſe *my name,* "though, for particular reaſons, I wiſh *our marriage* kept private for "ſome

" ſome time. And always am, Madam, your moſt obedient ſervant, " (Signed) ALEX. MORE. *Aberdeen, 1ſt May* 1780.——Addreſſed, *To " Mrs Captain Fairbairn, Aberdeen.*"——This letter, however, was antedated; for it was not written till the month of November 1780.

Afterwards the lady inſtituted againſt More, before the Commiſſary-court, an action of declarator of marriage. Having been judicially examined at the purſuer's requeſt, the defender emitted a declaration, of which, in ſubſtance, the import is, That his connection with her was the reſult of the moſt forward and ſeducing advances on her part: That he had never entertained any idea of making her his wife; had not once ſpoken a word to her capable of ſuch a meaning; nor had ſhe herſelf, till of late, any expectation of that kind: That the letter founded on was merely a piece of trick and deceit, deviſed by the purſuer and her relations, and was never underſtood to convey any ſerious declaration of marriage: That the nature of the artifice was this: The purſuer, when near the time of her delivery, pretended to the defender, that ſhe had been convinced by her friend Captain Grant, of its being much more proper for her to lie in at the houſe of her brother, Neil Macinnes, than any where elſe; but as, in order to induce him to receive her, there was a neceſſity for perſuading him that ſhe was actually the purſuer's wife; ſo for that purpoſe, and that only, as ſhe aſſured him, the letter, antedated as it was, had been drawn up by Grant: And that, while under this deception, and at the ſame time apprehenſive of danger threatened to his perſon by her relations, the defender tranſcribed the letter; only altering the addreſs at the beginning and end of it, from *Dear and loving wife*, to *Mrs Fairbairn*, and *Madam*.

The purſuer, on the other hand, gave into court a condeſcendence or declaration in writing; in which ſhe affirmed, that the defender's proteſtations of love and promiſes of marriage alone, had brought her into the above mentioned ſituation; that the letter was the conſequence of the defender's ſpontaneous offer, of doing every thing in his power for her benefit, except publicly declaring his marriage, which his dependence on his father, as he affirmed, rendered at that particular time highly improper; and that the defender did not alter the addreſs from what it was in the draught given by Captain Grant, but varied the date, from the true one in November, to that of 1ſt May, becauſe, as he ſaid, it would appear more decent to have it brought nearer to the time of the beginning of their intercourſe.

The Commiſſaries pronounced the following ſentence: " In reſpect " the defender does not allege he was either concuſſed to grant the " letter or acknowledgment libelled on, or was under any incapacity " to grant the ſame, find the marriage proven; and decern and de- " clare in terms of the concluſions of the libel."

Of this judgment More complained to the court by advocation, and

Pleaded: The ſum of the doctrines of our law relative to the conſtitution of marriage is, That for this purpoſe there is required either actual celebration by the uſual ſolemnities, or elſe a decree of the proper court, founded on ſufficient grounds, obliging the parties to ſolemnize it, and, upon their failure, declaring it to be complete; Lord Kames's Elucidations, p. 29. Theſe grounds are three in number.

One is, where parties, without ſacerdotal benediction, have, *per verba de præſenti*, declared before witneſſes, their mutual acceptance of each other as huſband and wife, and on this declaration conſummation has followed. Another is, a train of cohabitation as married perſons, and being publicly held and reputed ſo to be; which, from the acknowledgment implied in theſe circumſtances, eſtabliſhes a preſumption that an actual marriage has intervened, and founds the woman in her claim of terce by the ſtatute of 1503: But this, like other preſumptions, is capable of being refuted by contrary evidence. The laſt ground for eſtabliſhing a marriage, is a promiſe and ſubſequent *copula*.

In the preſent caſe, however, there occurs no proof of cohabitation, nor of a promiſe, antecedent to *copula*. The ſole ground of action is the letter above recited. The Commiſſaries have indeed found the marriage thereby proved. But, it may be aſked, What marriage? No actual marriage is charged even in the libel; and it is confeſſed that none had preceded when the letter was written by the defender. Neither can it, on account of the acknowledgment it contains, afford evidence to eſtabliſh a marriage at that time. The writer of it never meant it to convey any true or real acknowledgment of marriage, but merely to ſerve the very different purpoſe declared to him by the purſuer. If, on the other hand, ſhe or her friends underſtood it to have that effect, they were practiſing a groſs fraud and impoſition on the defender; and to ſuch an artifice the law will give no countenance. Nor has the account of this matter now referred to, and which is contained in the defender's judicial declaration, been diſproved. Even the mode of addreſs ſhows the letter to have been merely an oſtenſible one. A man addreſſing his wife, would not denominate her by the name of a prior huſband, nor conclude with the cold formal compliment of, Madam, your moſt obedient ſervant. Beſides the letter could not in any view afford evidence of marriage, which is a mutual contract, as it does not ſhew any conſent on the part of the purſuer.

Anſwered: By the more recent Roman law, marriage was accounted merely a civil contract, which might be completed without the intervention of any religious rite. Before the Reformation, indeed, agreeably to the Canon law, it was eſteemed among us a ſacrament; but after that æra it again appeared in the light purely of a civil contract. Hence, like other conſenſual contracts, it may be perfected by the acknowledgment of the parties; Lord Stair, b. 1. tit. 4. § 6.; Erſkine, b. 1. tit. 6. § 5. The ſame principle obtains in England, in France, and in Holland; Blackſtone, vol. 1. p. 439.; Inſtit. par. M. Argen. liv. 3. chap. 2. § 13.; Brower. *De jure Connub.* p. 255. Now, in the letter above referred to, Mr More makes this direct acknowledgment, "I hereby acknowledge that you are my "lawful wife." This muſt be held complete evidence of an anterior marriage. Even if it were not conſidered as ſuch, it would at leaſt amount to a declaration of conſent *de præſenti*, which, without any proof of ſubſequent *copula*, would be ſufficient to conſtitute marriage; for it is a maxim of our law, that *conſenſus, non concubitus, facit matrimonium*.

The defender has ſaid, that the letter was procured from him while under the influence of deception, and of intimidation. But the only evidence

evidence of this allegation, ſo improbable in itſelf, is his own words, which ſurely will never be deemed ſufficient. He has likewiſe argued, that the letter could not afford proof of a mutual contract, becauſe it did not eſtabliſh the conſent of the purſuer; but it was not founded on, except merely to prove the fact of the marriage; and indeed the defender poſſeſſed ſufficient evidence of the purſuer's conſent, by letters which he has declined to produce.

Obſerved on the Bench: This queſtion does not relate to a promiſe of marriage, nor to any diſtinction of antecedent or ſubſequent *copula*. The letter contains an explicit declaration or acknowledgment of marriage; and as there appears nothing to ſet it aſide, it muſt be received as undoubted evidence; nor is it of any conſequence that it does not expreſs mutual conſent.

The Commiſſaries had found the marriage proved; the Lord Ordinary had refuſed a bill of advocation complaining of that judgment; and

"The Lords adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Gardenſton.* Act. *Rae, Buchan-Hepburn, B. W. Macleod, Maconochie.*
Alt. *Ilay Campbell, Hay.* Clerk, *Orme,*

S.

N° XVII. *December* 21. 1781.

MACQUEEN and Spouſe, Petitioners.

JURISDICTION—*of the Court of Seſſion in Eccleſiaſtical queſtions.*

DURING the dependence of the queſtion between the petitioners and Mr Grant their pariſh miniſter, Fac. Coll. 25th July 1781, Mr Grant requeſted the preſbytery of Abernethy to take cogniſance thereof. The preſbytery gave a deliverance, declaring their opinion, "That Patrick Macqueen and his wife were not to be admitted, but "to remain ſuſpended from *church-privileges* during the dependence of "the action againſt Mr Grant; but that, upon their renouncing that "proceſs, and giving proper ſatisfaction to the preſbytery, and con-"forming to the laws of the church, they ſhould be reſtored to their "former ſituation."

Macqueen and his wife preferred to the Court of Seſſion, a ſummary petition and complaint againſt this ſentence, as oppreſſive, and highly derogatory to the dignity of this Court, before which the action depended; and concluded for a proper cenſure upon Mr Grant, and for ſuch relief and protection to themſelves as ſhould be deemed neceſſary.

The petition was refuſed as incompetent.

For the Petitioners, *Croſbie.*

C.

N° XVIII.

N° XVIII. *January* 15. 1782.

ROSE,

AGAINST

ROSES.

LEGACY. *Jus accreſcendi.*

ALEXANDER ROSE, by his teſtament, provided, "That the ſum "of 6000 merks, due to him by Forbes of Ballogie, ſhould be "*equally* divided between his two brothers John and James."

John predeceaſed the teſtator; and the queſtion occurred, whether his ſhare lapſed, thereby making room for the teſtator's next of kin; or whether it accreſced to James as *conjunctus verbis.*

Pleaded for the teſtator's next of kin: Where a perſon legates his eſtate to A, and, in the ſame teſtament, legates that eſtate to B, it appears that the whole eſtate was meant for each; and it is only from the impoſſibility of giving one ſubject *in ſolidum* to two perſons, that a diviſion muſt neceſſarily follow. Hence, when, by any circumſtance, the legacy does not take place as to one, the right of the other, meeting with no obſtruction, acts with full effect. In like manner, where one bequeaths an eſtate to A and B, he legates that eſtate to each; and any of them, upon the failure of the other, is entitled to the whole. But the caſe is very different where the teſtator bequeaths an eſtate to A and B by *equal* parts, or *equally.* There the bequeſts to each are totally ſeparate; and as, without any expreſſion of that kind, the ſhares of the perſons favoured would have been equal, this addition, which muſt not be deemed ſuperfluous when any meaning can be affixed to it, muſt be held to ſignify, that each legatee is to have no more than a half. This is the opinion of Voet, and moſt of the Commentators on the Civil law; of Stair, b. 3. tit. 8. § 27.; and of Bankton, b. 3. tit. 8. § 52.; and it is confirmed by a deciſion, Dict. of Deciſ. vol. 3. *voce* Legacy; Paterſon *contra* Paterſons.

Anſwered for the legatee: Had the expreſſion *equally* been omitted, there could have been no doubt of James being entitled, upon failure of his brother, to the whole legacy. Neither can it be ſuppoſed, that the teſtator, by this expletive, meant to limit to a half the right of the perſons favoured. This matter is well explained by Vinnius, in his Commentary on the Inſtitutes, lib. 2. tit. 20. § 16. "Qui ſic legat: Titio "et Seio fundum Tuſculanum do, lego, *ex æquis partibus,* is utique "conjungit utrumque in eandem rem, dum ſimul et ſemel eundem "fundum ambobus legat. Nec mutat hanc conjunctionem *partium* "*æqualium* expreſſio; nam etſi hæ partes non exprimantur, tacite ta-"men ſignificantur enumeratione perſonarum. Quæ autem non ex-"preſſæ intelliguntur, tamen ſi exprimantur, pro ſupervacuis ha-"bentur."

" bentur." Upon theſe principles, he lays it down, " Si unus defi-
" ciat etiam in *verbali conjunctione*, ſic mentem teſtatoris acceptam
" quaſi in hunc caſum alterum ſolidum habere voluerit, nec ob aliam
" cauſam ad eandem rem utrumque vocaverit, quam quod eam rem
" vel alterum eorum *magis habere voluit quam heredem ſuum.*"

But, 2*dly*, Without entering into the nice diſquiſitions of the Roman lawyers, and attending to what was really meant by the teſtator, the deciſion of this caſe muſt be favourable to the legatee. It is evident that the teſtator meant to beſtow 3000 merks on each of his brothers. By his own contractions, the debt due by Forbes of Ballogie is reduced to that ſum; which therefore ought to be adjudged to the ſurviving legatee.

Replied for the teſtator's next of kin, on the ſecond point: The legacy bequeathed to each legatee, is the half of the debt due by Ballogie; and its decreaſe cannot, in ſound conſtruction, have any influence upon the right meant to be conferred on the legatee.

The Lords were of opinion, That, in legacies conceived in this form, the *jus accreſcendi* did not take place; and, therefore,

" They preferred the next of kin."

Lord *Kennet*, Reporter. For the Teſtator's next of kin, *Ilay Campbell, Hay, Honyman.*
For the Legatee, *Rae, Abercromby.* Clerk, *Home.*

C.

N° XIX. *January* 17. 1782.

LADY GRAY,

AGAINST

BLAIRS.

RUNRIG. *What grounds fall under that denomination.*

THE lands of Inchyra belonged to Lady Gray, to Mrs Blair of Inchyra, and to Mr Blair of Balthyock; and their reſpective properties lay blended together in a great number of fields of different ſizes. Some of theſe fields conſiſted of thirty-five acres, ſome of them of ten; but by far the greateſt part did not exceed five acres.

Lady Gray inſiſted in a diviſion of the whole, upon the 23d chap. parl. 1695, entitled, *An act anent lands lying runrig.*

The Lords ſeemed to be of opinion, That the lateſt deciſions had rather gone beyond the intention of the Legiſlature, when authoriſing the diviſion of *runrig*-lands. It was likewiſe obſerved on the Bench, That the deciſion Sir Laurence Dundas againſt Bruce of Kinnaird, in 1773, could not be quoted as a precedent, the proceſs of diviſion

in that caſe having met with no ſerious oppoſition. In this caſe, they refuſed to ſuſtain action as to the fields containing more than four acres.

Lord Ordinary, *Elliock.* Act. *Nairne.* Alt. *Rolland.* Clerk, *Campbell.*

C.

N° XX. *January* 17. 1782.

TIMOTHY LANE, and others, Creditors of the York-buildings Company.

AGAINST

WALTER CAMPBELL of Shawfield.

GROUNDS and WARRANTS. *Diſconformity in warrants of adjudications appearing on production after twenty years from their dates, if challengeable.*

IN the proceſs of ranking of the creditors of the York-buildings Company, it was

Objected to the intereſt of Mr Campbell, founded on ſeveral decreets of adjudication, That the ſummonſes were not conformable to the bills which were their warrants; as appeared upon production of theſe warrants themſelves.

Anſwered for Mr Campbell: The decrees in queſtion were extracted above fifty years ago. But, after twenty years, it is not neceſſary to produce the warrants of any decree; Cutler of Oroland, Dict. *voce* Grounds and Warrants; Maxwell and Riddel *contra* Maxwell, Kilkerran, p. 227.; Irvine of Drum *contra* Earl of Aberdeen, in 1775.—Nor though they ſhould happen to be extant, can any argument be founded upon them; Truſtees of Murray of Stanhope againſt Earl of March, 1772.

Replied: It has indeed been generally held, that, after the lapſe of twenty years, parties are not bound to produce the warrants of decreets, as in the caſes already cited. But however reaſonable or expedient it may be to ſecure parties, after ſuch a length of time, from ſuffering loſs by the mere want of warrants, it will not follow, that, from the lapſe of a greater or of any number of years, objections ſhould be barred which are founded on intrinſic nullities or informalities appearing from actual production of the warrants themſelves. *Quod initio vitioſum eſt, tractu temporis convaleſcere non poteſt.*

It was farther *objected* to one of the above mentioned adjudications, which had been deduced by a perſon called *Somerville:* That though the ſum of L. 50, 9s. Sterling was originally libelled for in name of damages,

damages, and contained in the decreet which was firſt extracted; yet that the new extract now produced bears, without any warrant whatever, a decerniture for L. 84.

Obſerved on the Bench: The warrants of decreets are commonly left in the cuſtody of inferior officers, ſome of whom might poſſibly be tempted by parties to falſify thoſe warrants, were this artifice to have effect at ſuch a diſtance of time as would render its detection difficult or impoſſible. For that reaſon, although the *grounds* of decreets of adjudication, if called for within the years of preſcription, muſt be produced; yet the law does not require exhibition of their *warrants* after twenty years. From ſo long an acquieſcence of the parties intereſted to challenge them, *omnia præſumuntur rite et ſolenniter acta;* though, if an adjudger ſhould himſelf produce the warrants, by thus acknowledging their authenticity, he muſt anſwer for any nullities or informalities which they may labour under.

The objection relative to the penalty was conſidered as affording good ground for modifying that claim to a very ſmall amount.

The Lords adhered to the Lord Ordinary's interlocutor, "repelling "the objections; with this variation, that they modified the ſum "contained in John Somerville's adjudication and conſtitution for "damages and expences to L. 5 Sterling; and in ſo far reſtricted the "accumulated ſum contained in the ſaid adjudication."

A reclaiming petition for Timothy Lane againſt this judgment was refuſed without anſwers.

Lord Ordinary, *Monboddo.* For Objectors, *Rae, Elphinſton.* For Shawfield, *Ilay Campbell.*
Clerk, *Colquhoun.*

S.

N° XXI. *January* 17. 1782.

JOHN STEWART,

AGAINST

Lieutenant-Colonel ARCHIBALD CAMPBELL.

INFEFTMENT. *If an heritable office, pertaining to the King's Houſehold be tranſmiſſible by baſe infeftment.*

THE office of Heritable Uſher to the King has belonged, for ſeveral centuries, to the family of the Cockburns of Langton. A fee, or yearly penſion, of L. 250 was lately annexed to this office; the emoluments of which formerly conſiſted in the livery or maintenance

tenance afforded to the Uſher's attendants; ſuch as his Eſquires, Archers, and Sword-bearers.

The progreſs of the titles by which the Uſherſhip has paſſed from one poſſeſſor to another, is that of charters, ſeiſins, and retours; and theſe, which are extant for two centuries back, are of the ſame nature with thoſe concerning lands or other feudal ſubjects.

In 1747, as a patrimonial ſubject, this heritable office was found by the court to be adjudgeable.

Sir James Cockburn, in ſecurity of a large debt, diſponed the office to Mr Stewart; who took infeftment on the precept contained in the diſpoſition; of which a conſiderable time afterwards he obtained from the crown a charter of confirmation.

After the date of the infeftment, but previouſly to the charter of confirmation, Sir James, in ſecurity of another debt, executed a new diſpoſition of the ſame office, in favour of Colonel Campbell; upon which the Colonel, likewiſe prior to the confirmation, expede, and was infeft on a charter of reſignation under the great ſeal.

A competition for the profits of the Heritable Uſherſhip accordingly enſued in a proceſs of multiple-poinding before the court; and the point on which the deciſion depended was, whether this office had been effectually conveyed by the prior infeftment, being a baſe right; or, if the public right, though poſterior, were not the only competent mean of tranſmiſſion.

Pleaded for Colonel Campbell: Though feudal rights are generally capable of being tranſmitted by baſe as well as by public infeftment, yet this is not any of their eſſential qualities. Various inſtances occur in which they do not admit ſubinfeudation; and among theſe the caſe now in queſtion is to be claſſed. Thus, the right of ſuperiority cannot be communicated to a ſubvaſſal. In the ſame predicament were our juriſdictions, though often conſtituted by feudal grant, and hereditary, and though ſome of them were neceſſarily connected with lands. Of the laſt ſort were thoſe of regality, and of barony. The Lord of regality, or the baron, might indeed ſubfeu his lands, but could not thus tranſmit his juriſdiction. When he appointed a bailie, or deputy, the juriſdiction was ſtill exerciſed in his own name. Such, too, was the caſe of thoſe feudal juriſdictions that, in their nature, were independent of lands; ſheriffſhips, bailiaries, conſtabularies, ſtewartries; Craig, p. 105.; Stair, b. 2. tit. 3. § 45.; Erſkine, b. 1. tit. 4. § 27.; Bankton, b. 4. tit. 16. § 6. The ſame principle regulated hereditary honours and diſtinctions; as thoſe of bearing the crown at coronations; of leading the van of the King's armies in battle, or of poſſeſſing the firſt ſeat in parliament. Inferior offices, like thoſe of Carver, Cup-bearer, Armour-bearer, or that of Uſher now in queſtion, likewiſe granted in fee and heritage, were equally incapable of ſubinfeudation. Nothing indeed could be more incongruous with the nature of all theſe offices, whether ſuperior or inferior, than ſuch a conſtitution as would render them independent of the Sovereign, about whoſe perſon, or in whoſe houſehold they were exerciſed.

Moreover, offices in general being in their nature indiviſible, do not, like lands, admit a partition of intereſts, as that between ſuperior and vaſſal, one of whom may hold the *dominium directum*, while the other

other poſſeſſes the *dominium utile.* Beſides, with reſpect to the uſherſhip in particular, if the right to that office were divided between a ſuperior and his vaſſal, with what propriety could either of them receive the denomination of *principal and ſole Uſher to the King*, by which the office is diſtinguiſhed?

Among the writers on the law of Scotland, not even the fainteſt traces are to be diſcovered of the notion of ſubinfeudation of offices; and as little can any be found in the ſyſtems of the foreign feudaliſts; of *England*, for example; or of France, that kingdom where probably firſt aroſe the practice of conferring offices in fee and heritage; *Le Droit des Offices, par* Loyſeau, liv. 2. chap. 2. Nor indeed is there any kind of evidence that ſuch a practice has ever obtained in Scotland.

Pleaded for Mr Stewart: That the office in queſtion is patrimonial, and *in commercio*, is a point eſtabliſhed by the deciſion in 1747. Being a feudal ſubject, it muſt therefore be neceſſarily tranſmiſſible by infeftments *de me*, equally as *a me.* Every patrimonial right which is *in commercio*, and adjudgeable, may be acquired by any perſon, or number of perſons; or may be attached by creditors, whether more or leſs numerous, and in whatever condition of life; women or children not excepted. Nor can it make any difference, whether rights thus acquired have been completed by baſe or by public infeftment.

No juſt example of a contrary principle can be given. The right of ſuperiority has been referred to erroneouſly. This feudal ſubject being *in commercio*, is not the leſs capable of ſubinfeudation, that the vaſſal has a title and an intereſt to object to the multiplication of ſuperiors. With his conſent nothing hinders the ſuperiority from being ſubfeued, and an additional ſuperior interpoſed between him and the former; in the ſame manner as vaſſals in church-lands have it in their option, either to hold their lands of the Crown, or of the Lords of Erection. Neither is the other inſtance, that of juriſdictions, well founded; of the ſubinfeudation of which many examples have actually occurred.

With reſpect to the intrinſic impropriety or incongruity of offices being held in different reſpects by different perſons, or by any other than thoſe nominated *ob delectum perſonæ*; ſuch a topic might have been properly urged againſt their being conſidered as patrimonial ſubjects; but now when this is admitted, that, being its neceſſary conſequence, as already obſerved, muſt follow of courſe.

The court conſidered this laſt concluſion as unavoidable and deciſive of the queſtion; a feudal ſubject's being *in commercio* implying that it is tranſmiſſible by baſe infeftment.

The Lords, therefore, upon adviſing a reclaiming petition and anſwers, adhered to a former interlocutor of the court, thereby brought under review, which was as follows: "Upon report of the Lord "Weſthall Ordinary, and having adviſed the mutual memorials for "John Stewart, Eſq; and Lieutenant-Colonel Archibald Campbell, "and heard parties procurators in their own preſence, upon what is "above repreſented; the Lords repel the objection to the ſaid John "Stewart's intereſt, and prefer Captain Archibald Stewart, his bro-"ther-german, and heir therein, to the ſums now in the hands of the

" raiſer of the multiple-poinding, and to the ſums to fall due in time " coming ; and remit to the Lord Ordinary to proceed accordingly."

Lord *Weſthall*, Reporter. For Mr Stewart, *Wight, Blair.*
For Colonel Campbell, *Ilay Campbell, Rolland.* Clerk, *Robertſon.*

S.

N° XXII. *January* 17. 1782.

ARCHIBALD TOD,

AGAINST

ELIZABETH WELLS, and others.

PERSONAL OBJECTION. PERSONAL AND REAL. *A purchaſer not infeft, having granted a leaſe, if, upon the ſale being reduced, the leſſee can challenge his author's right.*

ARCHIBALD MEGGET took in leaſe the lands of Gosford, belonging to Captain Henry Wedderburn. Soon afterwards Captain Wedderburn, then in India, authoriſed certain commiſſioners to ſell theſe lands, which were purchaſed at a public roup by Sir John Halket. But though the commiſſioners were thus empowered to ſell the lands, they had received no authority to grant a diſpoſition, or to give ſeiſin of them.

In the mean time Sir John Halket and Archibald Megget entered into a new leaſe, for a ſhorter term than that of the former; but on account of greater latitude being allowed in the culture, a higher rent was ſtipulated. Captain Wedderburn, however, having died, and the neceſſary writings remaining unexecuted, Sir John Halket, without oppoſition, obtained decreet reducing the ſale. Megget poſſeſſed the farm till the expiry of the term ſtipulated in the new leaſe. Upon this, Mr Tod factor appointed by the court on the eſtate, of which a proceſs of ſale had been brought at the inſtance of Captain Wedderburn's apparent heir, raiſed an action againſt Elizabeth Wells, and other repreſentatives of Megget, then dead, for payment of the arrears which had been due by him, according to the new leaſe. They, being deſirous to abide by the former one, in which the term of endurance was larger, and the rent ſmaller than thoſe of the latter.

Pleaded in defence: Sir John Halket never had more than a perſonal right to the lands, and therefore could not grant a leaſe of them to be effectual againſt ſingular ſucceſſors; thoſe ſucceſſors at leaſt who do not derive right from him. Nor, for the ſame reaſon, could he effectually relinquiſh or evacuate a ſubſiſting leaſe of thoſe lands. If ſo, the defenders ſtill continue to be bound by their former one; which, as it is thus binding againſt them, is certainly not leſs obligatory in their favour. Being then a ſubſiſting leaſe, the defenders are willing to hold by that firſt bargain, in oppoſition to which the preſent action cannot proceed.

Anſwered:

Anſwered: Sir John Halket having been truly proprietor of the eſtate, his titles to which he might at any time have completed by adjudication in implement, leaſes granted by him would have been effectual againſt the heir of Captain Wedderburn. In this caſe then his diſcharge of a prior leaſe is not leſs valid and binding. Nay, though he had only been a putative proprietor, the leſſee would have become effectually bound on the true proprietor's recogniſing his acts; and this the purſuer, in the preſent proprietor's name, now does. The ſecond leaſe, therefore, ought to regulate the claims of the parties; and on it the preſent action is founded.

Obſerved on the bench: The leſſee, in virtue of the new tack, continued the poſſeſſion during the full period of its endurance. He was not, nor are his repreſentatives, entitled to challenge or object to the right of his author.

The Lord Ordinary had pronounced an interlocutor, finding, "That "the leaſe granted by Sir John Halket on the ſuppoſition of his be- "ing proprietor of the eſtate of Gosford, which it was afterwards "found he was not, was *not* obligatory on the defenders;" but the court altered that judgment, and

"Found, That the above mentioned leaſe *was* obligatory on the "defenders."

Lord Ordinary, *Alva.* Act. *Tait.* Alt. *D. Græme.* Clerk, *Orme.*

S.

N° XXIII. *January* 23. 1782.

HUGH WATT,

AGAINST

HENRY RITCHIE.

PERICULUM *. *A ſhip, whoſe name had been lately changed, being inſured under the former one, if ſuch inſurance be effectual.*

RITCHIE underwrote an inſurance on a ſhip, by the name of *The Martha of Saltcoats*, which belonged to Watt, for a voyage from Chriſtiana in Norway to the Frith of Clyde. Though this name was mentioned to the inſurance-broker by the perſon commiſſioned to make the inſurance, and had been formerly borne by the veſſel, yet another appellation was given to her prior to the inſurance, that of *The Elizabeth and Peggy of Saltcoats*; under which new and proper denomination,

* No caſes of inſurance occur in any of the volumes of the Dictionary of Deciſions, though the laſt of theſe volumes extends to the year 1770. The title *Periculum* appeared the moſt proper, of any of thoſe in the Dictionary, for claſſing this queſtion; but, in the future progreſs of that work, the article *Policy of Inſurance* will probably be added, on account of the peculiar ſtrictneſs of interpretation, and other particulars, which diſtinguiſh this important contract.

nomination, it may be noticed, the owners of the cargo a few days after made an inſurance of this from the ſame Mr Ritchie. The veſſel having been captured by a French privateer, Watt ſued Ritchie in an action for the inſured value.

Pleaded for the defender: The law requires the utmoſt degree of preciſion and accuracy in the tranſactions, and the ſtricteſt interpretation of the contracts of parties, relative to inſurance. Even the ſmalleſt deviation from the terms preſcribed in their ſtipulations, though producing no apparent influence on the objects in view, will prove fatal to the inſurance; 15th July 1779, Buchanan *contra* Hunter-Blair.

Although, then, it were to appear that the erroneous inſurance of the *Elizabeth and Peggy* under the name of *Martha*, had not any tendency to injure the defender, the contract would nevertheleſs be void, as its terms really reſpected a non-entity, and ought not to be extended by interpretation to any adventitious meaning. In fact, however, it had ſuch a tendency, as it led him, contrarily to a maxim founded in the experience of all thoſe who are verſant in the buſineſs of inſurance, to accumulate different riſks on the ſame bottom. Beſides, ſuch a proceeding might often become an engine of fraud: For, ſuppoſe another veſſel, the true name of which was the Martha, to have ſailed along with the Elizabeth and Peggy; in that caſe the purſuer, if the principle above ſtated were not to be received, might have claimed his inſurance on either of the two veſſels upon which the loſs ſhould have happened, though the premium had been paid for one only.

Anſwered: Fair and accurate repreſentations of facts by the inſured to the inſurer are no doubt proper and requiſite; but to trivial circumſtances it is unneceſſary to pay much attention; and no concealment or inaccuracy is regarded as of importance in this contract, unleſs either "fraudulent, or materially varying the object of the poli-"cy, or changing the riſk underſtood to be run." This is the opinion of an eminent judge in the ſouthern part of the iſland; Burrow's Reports, vol. 3. p. 1911. Nor is an error merely as to the name of a ſhip, which is otherwiſe ſufficiently diſtinguiſhed, of that important kind. Accordingly, in all policies of inſurance reſpecting ſhips, not only in this but in every other country, after the deſcription of the veſſel, theſe words are to be found, "or by whatſoever name or "names the ſame ſhip *is* or ſhall be called;" Weſket's Digeſt of the Theory of the Laws and Practice of Inſurance, p. 403.; Magen's Eſſay on Inſurance, vol. 2. p. 4. In particular, this clauſe occurs in the policy in queſtion, and ſeems directly to preclude the defender's plea.

No precedent, exactly ſimilar to the preſent caſe, is to be found among the deciſions of the judges of this or of the neighbouring kingdom. But, in the *Quæſtiones juris privati* of Bynkerſhoek, lib. 4. cap. 11. p. 610, 611, 612, a judgment is recorded, which was given in 1722, by the ſupreme court of Amſterdam, on a caſe preciſely of the ſame kind; in which inſurance had been made on a veſſel under the name of *Thomas*, but whoſe true name was the *Dauphin Galley*. In that caſe, as in the preſent, the error in the name was not fraudulent; and therefore the Senators determined, "damnandum aſſecuratorem "in eam ſummam pro qua ſe obligaverat."

The

The Lords were of opinion, That a ſacred ſtrictneſs ought to be preſerved in the interpretation of contracts relative to inſurance; and therefore adhered to the judgment of the Lord Ordinary, which was the following: " In reſpect it is acknowledged by the purſuers, " that their ſhip was regiſtered by the name of *The Eliſabeth and Peg-* " *gy of Saltcoats*, finds they have no claim againſt the defender up- " on the inſurance made by him on the ſhip Martha of Saltcoats, " there being no ſuch ſhip, at leaſt the true name being concealed " or miſrepreſented, by which the underwriter might have been de- " ceived; therefore ſuſtains the defences, and aſſoilzies the defender; " and decerns."

Lord Ordinary, *Weſthall.* Act. *Cullen.* Alt. *Ilay Campbell.* Clerk, *Home.*

S.

N° XXIV. *January* 24. 1782.

Ranking of the CREDITORS of JARVIESTON.

EXECUTION.

IN this ranking, an inhibition was found null, becauſe the execution did not bear the three oyeſſes, nor the open proclaiming or reading the letters.

Lord Ordinary, *Braxfield.* For the Inhibiting Creditor, *Cullen, Roſs.*
For the other Creditors, *Maclaurin, Henry Erſkine.* Clerk, *Menzies.*

C.

N° XXV. *January* 29. 1782.

ARCHIBALD MACARTHUR-STEWART,

AGAINST

WILLIAM FULLARTON, and others.

BILL OF EXCHANGE—*payable at the granter's death,—if actionable, that happening thirty-ſeven years after the date.*

ON 1ſt Auguſt 1743, John Stewart-Murray of Blackbarony, granted to Mrs Mary Stewart, his ſiſter, a bill of the following tenor: " Brother, Pay to me, at the firſt term of Whitſunday or Martinmas " *after your deceaſe*, L. 140 Sterling money, *value received* from your

" ſiſter, MARY STEWART.—To John Murray of Blackbarony, Eſq;—
" Accepts, J. ST. MURRAY."

Mr Murray ſurvived the date of this bill thirty-ſeven years; having made an entail of his whole eſtate, real and perſonal, in favour, firſt of his ſiſter, and next of Mr Macarthur-Stewart. Upon the death of that lady without iſſue, her executors demanded from the latter, then ſucceeding to the whole moveables which had belonged to her brother, and were in her poſſeſſion, deduction of the debt due to herſelf by the above bill.

Pleaded for the heir: A bill payable at a term poſterior to the death of the granter, is truly a novelty; and in the preſent caſe that event did not happen for thirty-ſeven years after its date. As a document of debt, the bill in queſtion muſt appear in a light equally extraordinary and dangerous. Should it be ſuſtained to that effect, many new opportunities would ariſe of committing forgery with impunity. But perhaps it ought rather to be conſidered as conſtituting a legacy in a manner not authoriſed by law.

Anſwered: As this bill bears value received, ſo there is no evidence of its having been intended to conſtitute a legacy. It is therefore to be underſtood as a voucher of debt; to which it is no ſufficient objection, that the reaſon of poſtponing payment till the death of the granter cannot be clearly ſhown; eſpecially as the tranſaction occurred between perſons ſo nearly related.

The Court did not view the bill as conſtituting a legacy. They thought, however, that the right which it contained was of ſo anomalous a kind, as not to be the proper ſubject of a bill; and therefore adhered to the Lord Ordinary's interlocutor, " ſuſtaining the objec-
" tions to the bill."

Lord Ordinary, *Gardenſton.* Act. *Wight.* Alt. *Ilay Campbell.* Clerk, *Robertſon.*

S.

N° XXVI. *January* 29. 1782.

WILLIAM REID, and others, Creditors of John Geils,

AGAINST

STEPHEN MAXWELL.

INDEFINITE PAYMENT,—*how to be applied in extinction of a principal ſum and annualrents.*

GEILS having become bankrupt, his eſtate was ſold by truſtees veſted in it for behoof of his creditors; and William Sheills, one of theſe creditors, having purchaſed a part it, he, along with Maxwell, as his cautioner, granted bond for the price; with this

this *proviſo*, That the dividends which might be due to Sheills, as a creditor of Geils, ſhould, when ſettled in the ranking, be allowed out of the ſums in his own hands.

During the pendency of that proceſs, which continued many years, Sheills too became bankrupt; and, by a deciſion of the court, it was found, that the cautioner, in terms of the act 1695, c. 5. was liable for the principal ſum only, and that part of the intereſt which had become due within ſeven years after the date of the bond. When therefore the dividends were at length to be determined, about forty years after the date of the bond, it became a queſtion of importance to the cautioner, and to the creditors, whether thoſe due to Sheills were to be allotted out of the principal ſum, and the annualrents that were owing during the ſeven years above mentioned; annualrents for which the cautioner was anſwerable; or out of ſuch as had become due after the lapſe of the ſeven years, of which payment could be claimed from no perſon but the principal debtor, who was a bankrupt.

Pleaded for the cautioner: In terms of the *proviſo* above mentioned, the dividend in queſtion ought to be wholly allotted out of that part of the debt for which the cautioner is bound; for otherwiſe he would not have the full benefit of that ſtipulation. Even independently of the *proviſo*, it ought to be ſo applied, becauſe it is to be conſidered as an indefinite payment made by Sheills. That part of the debt for which the cautioner is bound, and that for which there is no cautioner, ſhould be held as diſtinct from each other; and the principal debtor being bankrupt, an indefinite payment is to be applied for the benefit of the cautioner rather than of the creditors. In this manner it will operate, in the firſt place, to the extinction of the annualrent, for which the former is bound, and then, ſo far as it extends, to that of the principal ſum. Or, if this may not be touched while any intereſt is outſtanding, and even though no preference were given to the cautioner, ſtill the application muſt, in the firſt place, be made to the annualrents firſt due; that is, thoſe for which he is reſponſible.

Pleaded for the creditors: The *proviſo* will have its full operation, if the dividend of the bankrupt's effects be allowed out of any part of the debt due by Sheills. This dividend, however, is not a payment by Sheills, but one made to him of his proportion of the fund belonging to the whole creditors; which ſhare may be taken from any part of theſe common funds; and out of no part of them can it be more properly allotted than from the unſecured annualrents in his own hands, as theſe, unleſs applied in this way, muſt be altogether loſt. Even conſidered as an indefinite payment made by Sheills, the dividend ought to be applied to that portion of the debt which is leaſt ſecured, and therefore not to the annualrents that firſt became due, but to thoſe for which no cautioner's ſecurity is interpoſed; the circumſtance of priority here being immaterial, as the whole debt is now equaly exigible; or, at leaſt, the application ſhould be made proportionally to both.

The Lords, after a hearing in preſence, adhered to the interlocutor of the Lord Ordinary, " finding, That the dividend was to be " applied

" applied in extinction of the annualrents before the principal, and " of the annualrents falling firſt due before the poſterior annualrents."

Lord Ordinary, *Braxfield.* For the Cautioner, *Ilay Campbell.* For the Creditors, *Mat. Koſs.* Clerk, *Colquhoun.*

S.

N° XXVII. *February* 6. 1782.

WRIGHT,

AGAINST

GAMMELL.

MEDITATIO FUGÆ. *When caution is exigible on that ground.*

GAMMELL inſtituted an action againſt Wright, who had been one of his factors in America, to oblige him to account for the proceeds of two ſhips and their cargoes, ſaid to be purchaſed by him for the purſuer's behoof; otherwiſe concluding for the ſum of L. 5000 Sterling as the amount of the profits ariſing from that tranſaction, together with L. 1000 as the expence of proceſs.

During the dependence of this action in the Court of Seſſion, Gammell applied to the Sheriff-depute of the county of Lanerk, within who e juriſdiction Wright then reſided, ſetting forth the action then depending, the defender's having no funds in this country, and his intention ſoon to leave the ſame: And therefore praying that he ſhould be apprehended, and obliged to find caution *judicio ſiſti* to the extent of the ſums found due in the ſaid action.

Wright having been called before the Sheriff, acknowledged the truth of the facts ſet forth; and the Sheriff immediately granted warrant for incarcerating him till he found caution in the terms prayed for. Againſt this judgment Wright applied to the Court of Seſſion, and

Pleaded: The arreſtment of one's perſon, as *in meditatione fugæ*, is an extraordinary exertion of the civil power; and as it may be the handle of much oppreſſion, and productive of great embarraſſment in a commercial nation, is only to be tolerated upon the beſt grounds, and for the moſt urgent reaſons.

Hence, to the due obtaining of this ſummary warrant, two things are eſſentially neceſſary: *Firſt*, The production of a clear and determinate ground of debt, authenticated in ſome degree by proper evidence; whereas here the incarceration proceeded upon a claim, unſupported by proof, illiquid in its nature, and ſo extenſive in its conſequences, as to intimidate every friend of the defender from interpoſing in his behalf. *Secondly*, Proof is required, either from circumſtances, or at leaſt

leaſt by the arreſter's oath, that the debtor means to *fly* the country for debt; and on this principle, according to Lord Stair, b. 4. tit. 47. § 23. the power of judges in granting theſe warrants is limited to the caſe where the debtor meditates an *eſcape* from juſtice. Here no ſuch deſign is imputed to the defender. His acknowledgment amounts to this, that having no proſpect of employment in this country he intends to take the firſt opportunity of departing for America, in the proſecution of his ordinary profeſſion.

Anſwered for Gammell: To prevent ſuits from becoming eluſory, it is now part of the common law of Scotland, that a perſon having a claim againſt another who is about to leave the kingdom, where he has no tangible funds, may apply in the manner which has been here adopted. To require evidence of the debt to juſtify ſuch application, would in moſt inſtances entirely fruſtrate the ends propoſed by it. It is therefore ſufficient for the party, to make oath, that a claim exiſts, and that he thinks it well founded; a criterion which the defender in this caſe has not thought it neceſſary to demand. The ſecond branch of the defender's argument is quite inconſiſtent with the nature of arreſtments of this kind. The deciſion of a judge muſt be equally ineffectual, from whatever cauſe the party againſt whom it is pronounced departs from the territory in which he is ſued. Hence Mr Erſkine, b. 1. tit 2. § 21. properly explains the expreſſion on which a critical argument is attempted by the defender, as including every caſe where the debtor means to leave the kingdom. In this caſe the defender's admiſſions ſuperſeded the neceſſity of proof on this point.

The Lords had no doubt of the propriety of the Sheriff's judgment; but to accommodate the defender as much as poſſible, they allowed him to find caution for his appearance ſix months after requiſition by the purſuer.

Lord Ordinary, *Braxfield.* Act. *Ilay Campbell.* Alt. *Mat. Roſs.*
Clerk, *Campbell.*

C.

N° XXVIII. *February* 6. 1782.

CHALMERS,

AGAINST

NAPIER.

IMPRESS-OFFICER. *Ship-carpenters. Protections.*

IN a queſtion between theſe parties, the Lords found,

1*mo*, That by act, 13th Geo. II. c. 17. a ſhip-carpenter, equally with any landſman, is exempted from being impreſſed for two years after he goes to ſea; and,

2*do*, That a protection, granted by the Lords of the Admiralty, is not the only mode of aſcertaining a party's right to this ſtatutory exemption.

Lord *Alva*, Reporter. For Chalmers, *Henry Erſkine*. For Captain Napier, *Solicitor-General*.

C.

N° XXIX. *February* 6. 1782.

BRODIE, ELLIS, and HERD,

AGAINST

NAPIER.

IMPRESS-OFFICER. *Smugglers*.

BRODIE, Ellis, and Herd, were impreſſed by Captain Napier's officers in circumſtances preciſely ſimilar to thoſe occurring in the caſe of Brownings, decided 19th January 1781. But when the legality of their impreſſment came to be diſcuſſed, their ſituation was very different. The Brownings had joined iſſue on the fact, that they were employed in a ſmuggling trade; they had redeemed their veſſel from the officers of the revenue, without waiting the event of a trial; and the cargo had been actually condemned in the Court of Exchequer. Here the parties impreſſed poſitively denied their having been concerned in a ſmuggling trade. An action for penalties, inſtituted in the Court of Exchequer on that ground, had been diſmiſſed, upon the public proſecutor's entering a *noli proſequi*; and their veſſel and cargo had been releaſed, by order of the Commiſſioners of the Cuſtoms, as having been unduly ſeized.

Captain Napier, however, maintained, that acts of ſmuggling could not only be eſtabliſhed by trial in Exchequer, but might be the ſubject of proof in the Court of Seſſion, and offered to bring a proof.

Obſerved on the bench: The carrying on of a ſmuggling or contraband trade has been juſtly found to deprive a perſon of his immunity from being impreſſed; but ſingle acts of ſmuggling, committed by perſons uſually employed in lawful commerce, ought not to be attended with ſuch a penal conſequence. Beſides, after a party's being acquitted of that charge in the proper court, it cannot be renewed againſt him in another.

A bill of ſuſpenſion had been preſented by the parties impreſſed, which was reported.

"The Lords paſſed the bill."

Lord *Alva*, Reporter. For Brodie, &c. *Croſbie*. For Captain Napier, *Solicitor-General*.

C.

N° XXX.

N° XXX. *February* 8. 1782.

HUGH MILLIGAN.

AGAINST

ALEXANDER BARNHILL.

COMMON INTEREST *. *Action* communi dividendo. *In what manner the intereſts of joint proprietors of an indiviſible ſubject are to be ſeparated.*

BARNHILL was proprietor of a brewhouſe, with the brewing utenſils, and acceſſory ſubjects; of which he ſold one half, *pro indiviſo*, to Milligan, who accordingly entered into partnerſhip with him in that trade.

On the diſſolution of the copartnery, Milligan raiſed an action for the purpoſe of compelling Barnhill to comply with one or other of the following alternatives; either to ſell to him at a certain rate his own ſhare, or at the ſame rate to purchaſe his ſhare; or elſe to concur in expoſing the whole to public roup, ſo that the price might be divided.

Pleaded for the defender: No man can lawfully be deprived of his property without his conſent or delict; nor can he be obliged to part with it, though full value ſhould be offered to him. Only the public benefit of the community could render ſuch an act juſt; and even in that ſituation it muſt be enforced by a ſpecial interpoſition of the Legiſlature. Hence, a common proprietor, *pro indiviſo*, is not to be compelled either to ſell his own ſhare, or to purchaſe that of another. A particular ſtatute indeed has authoriſed the diviſion of commonties; but, from this enactment, the contrary determination of the common law with reſpect to that ſubject, though in its nature diviſible, is apparent. By it no ſuch compulſatory diviſion is permitted; except, perhaps, in the ſingle inſtance of joint property in a ſhip, on account of the peculiarly hazardous and periſhable nature of that intereſt.

Pleaded for the purſuer: When a ſubject is in itſelf indiviſible, and when the uſe or exerciſe of it, as in the preſent caſe, is likewiſe indiviſible, the different intereſts of joint proprietors can only be rendered effectual by the methods now propoſed. The common law, therefore, will authoriſe ſuch a mode of ſeparating the intereſts of parties. If, indeed, the ſubject may be poſſeſſed in common, or prior to any diviſion, though with leſs advantage than after a ſeparation, it does not ſeem that, at common law, this can be enforced; and, for that reaſon, the ſtatute 1695 was neceſſary for authoriſing the diviſion of commonties. But, otherwiſe, the common law would have given a ſufficient ſanction; as is laid down both by Lord Stair, b. 1. tit. 3. § 15. and by Lord Bankton, b. 1. tit. 8. § 40.: For when the laſt mentioned author takes notice of the caſe of ſhips, it is as an

* The title *Common Property* does not occur in the Dictionary of Deciſions.

example

example of this general rule; not, according to the defender's obſervation, as an exception from a ſuppoſed contrary one. The ſame principle obtained in the Roman law; *l.* 55. *ff. De famil. erciſcund.*; *l.* 1. 3. *Cod. Comm. divid.*; Voet, *ad tit. ff. De fam. erciſc.* N° 2.

In the action *pro ſocio*, had the diviſion now claimed been ſued for in that proceſs, the defender would have had no plea.

Obſerved on the Bench: No perſon, in ſuch a caſe as the preſent, is to be compelled to remain longer *in communione* than he chuſes. Long before the act 1695, the brief of diviſion was known reſpecting property in lands. That ſtatute, with a view to the improvement of agriculture, refers to the peculiar nature of commonties, and does not relate to common property in general. With regard to this, as in the caſe of heirs-portioners, ſuch remedies as thoſe here propoſed muſt always have been competent.

This caſe was reported by Lord Kames; and afterwards, on a hearing in preſence,

"The Lords repelled the defence."

Act. *Maclaurin.* Alt. *Wight.* Clerk, *Menzies.*

S.

N° XXXI. *February* 13. 1782.

LLOYDS,

AGAINST

The APPARENT HEIR and CREDITORS of PATERSON.

RANKING AND SALE. *If deduction be given on account of a partial eviction, when the ſubject has been valued and ſold* in cumulo.

If any diſtinction be made in this matter between a ſale purſued by an apparent heir, and one at the ſuit of creditors.

AT a judicial ſale, at the inſtance of an apparent heir, there was ſold to Meſſrs Lloyds, at the price of L. 600 Sterling, "all and "hail the property of the ſplint-coal, and hail other ſeams of coal, "and machinery thereof, and the *grieve's* and colliers houſes be- "longing thereto; with the benefit of the tack of the lands of Weſt- "er Beath for the years thereof yet to run."

The grieve's houſe thus ſold, was a decent building, conſiſting of two ſtories, and covered with ſlate. Before the ſcheme of diviſion of the price was finally adjuſted, the proprietor of the lands under leaſe claimed the property of it; and the purchaſers, on this account, inſiſted for a proportional deduction from the purchaſe-money. In ſupport of this demand, they had recourſe to the arguments uſed in the caſes abridged in the ſecond and third volumes of the Dictionary under this

this title. They farther urged, That although in ſales carried on by creditors, who had attached the ſubjects merely as they ſtood in the perſon of their debtor, and were not poſſeſſed of his title-deeds, a purchaſer might, from the nature of the thing, be ſuppoſed to undertake the riſk of a partial eviction; yet the caſe was different where the ſale proceeded at the ſuit of an apparent heir, having acceſs to his predeceſſor's rights and evidents, and who could no more be juſtified in expoſing a ſubject not belonging to the anceſtor, than an ordinary vender.

The Lords did not diſtinguiſh an action of ſale purſued by an apparent heir from one at the ſuit of creditors. They ſeemed to think the purchaſers in this caſe might renounce the bargain altogether; and likewiſe, that if a ſeparate value had been affixed to each ſubject, they might have been allowed to renounce it as to the ſubject evicted. But the purchaſers declining to renounce, unleſs a conſiderable ſum laid out by them in the improvement of the ſubject was to be repaid,

The court refuſed to grant any abatement.

Lord Ordinary, *Alva.* For Meſſ. Lloyds, *Rae.* For the apparent Heir and Creditors, *Elphinſton.* Clerk, *Home.*

C.

N° XXXII. *February* 15. 1782.

COLTART,

AGAINST

TAIT, and her Tenants.

FEU. *Subinfeudation of lands before the act* 1633.

THE lands of Nether Bar, part of the barony of New Abbey, had been feued out by the crown, as coming in place of the monaſtery of that name, to the family of Gordon of Kenmore; and were by them ſubfeued, in the year 1613, to the predeceſſors of Mrs Tait.

The ſuperiority of theſe lands came by gift from the crown into the perſon of Mr Coltart, who obtained decreet againſt the preſent Kenmore, declaring them to be in non-entry. Mr Coltart afterwards inſtituted an action of ſpecial declarator againſt Mrs Tait and her tenants, which concluded for the full rents of the lands.

Againſt this concluſion the defenders

Pleaded: Feu-holdings, in their original nature, are mere locations, differing from other leaſes, only in the extent of their duration. The duties exigible by the ſuperior are the *rents;* upon payment of which the *feu-tenant* is entitled to the poſſeſſion, "into whatſoever "hands the lands may come;" act 1449, c. 17.

2do, By ſtatute 1457, c. 71. and 1503, c. 9. it is declared lawful for all perſons to ſet their lands in feu-farm; and that in caſe of the granter of ſuch feu-rights falling in ward, or incurring any feudal delinquency, the ſubvaſſal ſhall only be liable in the ſame ſubfeu-farms or duties which he was bound to pay to his immediate ſuperior. Theſe ſtatutes were in force when the defenders original feu-right was granted; and, of courſe, all that can be exacted from them is the ſubfeu-duties ſtipulated in their inveſtitures.

Anſwered: Leaſes do not afford any exception againſt the ſuperior having obtained decreet of non-entry; and feu-rights, from their aſſimilation to leaſes, cannot have a ſtronger effect.

2do, The ſtatutes quoted relate only to ward-lands, and expreſsly except "feus granted with diminution of the rental." Nor do theſe ſtatutes extend to the ordinary caſualties attending feudal contracts. From the indiſpenſable qualities of theſe contracts, the ſuperior muſt have it in his power, upon the demiſe of his vaſſal, to purſue a declarator of non-entry, and thereby to enter to the full poſſeſſion of the lands. The ſubvaſſals may indeed, by proper ſteps, inſtate themſelves in the right of their immediate ſuperior; but, by doing ſo, they come under every obligation to which this ſuperior was ſubject.

The Lords found the purſuer entitled to the full rents and duties of the lands till a vaſſal was entered; and thereafter to the duties payable to him by his immediate vaſſal; but in regard of the circumſtances of the caſe, and unfavourable nature of the claim to the full rents, found theſe due only from the date of this interlocutor.

Lord Ordinary, *Alva.* Act. *R. Dundas.* Alt. *Rae, Maclaurin, Blair.* Clerk, *Campbell.*
C.

N° XXXIII. *February* 16. 1782.

RIDDEL,

AGAINST

CREDITORS of NIBLIE.

BANKRUPT—*Act* 1696, *c.* 5. *Security for debts to be contracted.*

JAMIESON, upon the narrative of a price paid, diſponed his lands of Langſide to Niblie, *abſolutely* and *irredeemably;* and on this diſpoſition infeftment followed.

Of the ſame date with this diſpoſition, a backbond was granted by Niblie to Jamieſon, declaring, that no price had been paid by him; but that the infeftment was meant to ſubſiſt as a ſecurity for certain debts of Jamieſon, then in the perſon of Niblie, and for ſuch other debts as Niblie ſhould thereafter tranſact with Jamieſon's creditors.

Both

Both Jamieſon and Niblie died ſoon after; and their reſpective creditors having transferred their debts to truſtees, Mr Ridd, for the creditors of Jamieſon, inſtituted an action for ſetting aſide the infeftment. It contained, among others, a concluſion for reſtricting the ſecurity thereby created, to the debts due to Niblie at the date of the infeftment, upon that part of the act 1696, c. 5. which annuls "infeftments in relief or ſecurity of debts *to be contracted.*"

The Lords, in reſpect this was not an infeftment in relief, or ſecurity, but an abſolute diſpoſition to the property, ſuſtained the ſame to the extent of the debts due by Jamieſon to Niblie, at whatever time contracted.

Reporter, Lord *Juſtice-Clerk.* Act. *Ogilvie.* Alt *Nairne.* Clerk, *Home.*

C.

N° XXXIV. *February* 20. 1782.

HENDERSON,

AGAINST

BUDDO.

SEQUESTRATION—*on act* 1772. *Whether a factor's not having made up inventories of the debtor's effects entitles creditors to attach theſe effects.*

VIS ET METUS. *A deed granted under concuſſion from legal meaſures, if reducible.*

A Debtor's effects having been ſequeſtrated, in terms of the ſtatute 1772, and a factor appointed; one of the creditors thereafter proceeded to poind ſome houſehold-furniture, which the factor had allowed to remain in the debtor's poſſeſſion.

A friend of the debtor interpoſed on this occaſion, and relieved the goods, by granting his acceptance for the debt and expence of diligence; but, before it became due, inſiſted in a reduction, on this ground, That the ſubjects having been veſted in the factor for the behoof of the whole creditors, could not be carried off by diligence at the inſtance of an individual; and that, of courſe, the acceptance having been extorted by *concuſſion* of legal meaſures, ought to be ſet aſide.

Pleaded for the creditor: The debtor's effects not having been inventoried, as the ſtatute preſcribes, remained ſubject to the diligence of his creditors. At any rate, the objection here urged is only pleadable by the creditors or their factor, not by the debtor or any of his friends.

Anſwered: The factor's not having expede inventories in due time, is,

is, by the ſtatute, made the ground of ſummary complaint againſt him; and on this account he may be removed from his office; but that will not entitle a creditor to eſtabliſh a preference by diligence on the articles omitted. The bill in queſtion being a conſequence of the diligence, muſt ſtand or fall with it.

The Lord Ordinary ſuſtained the defences: But the Lords conſidered the poinding to have been illegal, and therefore

"Altered that interlocutor, and reduced the bill."

Lord Ordinary, *Braxfield.* Act. *Maconochie.* Alt. *Alex. Ferguſon.* Clerk, *Home.*

C.

N° XXXV. *February* 20. 1782.

THOMAS GEMMIL,

AGAINST

Colonel JOHN WALKINSHAW-CRAWFORD.

JURISDICTION—*of the Court of Seſſion. Whether an action of damages, founded on an acquittal in the Court of Juſticiary, be competent before the Court of Seſſion.*

COLONEL CRAWFORD having received certain anonymous threatening or incendiary letters, of which he ſuſpected Gemmil to be the author, brought him to trial before the High Court of Juſticiary. But Gemmil having been acquitted by his jury, he inſtituted, on that ground, an action of damages againſt Colonel Crawford; in ſupport of which he inſiſted, That it was not competent to have entered any claim for damages in the criminal court.

The Lords were of opinion, That this claim was competent before the Court of Juſticiary, and only there; as it would be a ſoleciſm, for the one ſupreme court to pronounce a judgment founded upon proceedings held in the other. It was further obſerved, that the claim's not having been entered there, betrayed ſuch a conſciouſneſs of its being ill founded, as would have precluded the preſent action, though otherwiſe proper; in the ſame manner as if the demand had been actually made in that court and rejected.

The court therefore diſmiſſed the action.

Lord Ordinary, *Alva.* Act. *Geo. Ferguſſon.* Alt. *J. Boſwell.* Clerk, *Menzies.*

S.

N° XXXVI.

N° XXXVI. *February* 20. 1782.

AGNEW,

AGAINST

MACRAE.

QUALIFIED OATH. *What qualities are intrinſic, where a creditor by bills falling under the ſexennial preſcription, refers* reſting owing *to the debtor's oath.*

IN a proceſs for payment of ſundry bills after the lapſe of the ſexennial preſcription, the purſuer having referred *reſting owing* to the defender's oath, he deponed, "That the bills had been accepted "by him, and never paid; but that he had never received any value "for them, but had given them, by miſtake inſtead of receipts, for "money advanced to him, on account of a ſon of the drawer, to "whom, upon the drawer's verbal engagement to repay, the depo-"nent had remitted goods to America." On this oath the purſuer

Pleaded: Every quality in an oath importing payment of a written document of debt, without producing any evidence by writ, of ſuch payment, is held to be extrinſic; Erſkine, b. 4. tit. 2. § 13.; Dict. *voce* Qualified Oath; 21ſt November 1671, Allan *contra* Young; 24th December 1679, Hume *contra* Taylor, Dict. vol. 3. *ibid.* Blair *contra* Balfour; 11th February 1761, Mitchell *contra* Macilney.

Anſwered: The ſtatute 12th Geo. III. c. 72. enacts, "That no bills "ſhall be of force, or effectual to produce any action, unleſs ſuch "action be raiſed before the expiration of ſix years." It farther provides, "That it ſhall and may be lawful and competent, at any "time after the expiration of the ſaid ſix years, to prove the debts "contained in the ſaid bills, and that the ſame are reſting owing, by "the *oaths* or *writs* of the debtor." By this act the bills founded on are no longer documents of debt. Parties are in the ſame ſituation as if no bills had been granted. Now, were this purſuer inſiſting for money as advanced by him, it would be undoubtedly relevant for the defender to ſwear, that he was never debtor to him, all his advances to the deponent having been made in implement of a prior obligation. The authorities and deciſions quoted apply to caſes, either where the written obligation ſubſiſted in full force, or where the allegation of payment was founded on circumſtances entirely foreign to the obligation ſued on, and ſo reſolved into a plea of compenſation, which cannot be eſtabliſhed by the oath of the party uſing it.

The Lord Ordinary found, "That the oath in this caſe did not "prove *reſting owing:*" And to this judgment the Lords adhered, upon adviſing a reclaiming petition with anſwers.

Lord Ordinary, *Gardenſton.* Act. *M'Cormick.* Alt. *Cullen.* Clerk, *Orme.*

C.

N° XXXVII. *February* 21. 1782.

SMOLLET CAMBPELL,

AGAINST

CAMPBELL of Craigniſh.

PRESUMPTION,—*Debitor donare non præſumitur.*

IN 1772, Campbell of Craigniſh executed bonds of proviſion in favour of his younger children, and delivered the ſame to their uncle for their behoof. Among the reſt, he obliged himſelf to pay to Smollet Campbell, "upon his attaining the years of majority, the "ſum of L. 400 Sterling; and in the mean time to maintain and "educate him in a manner ſuitable to his ſtation in life."

In 1775, Smollet, then ſeventeen years of age, and a ſtudent at the college of Glaſgow, was appointed an enſign in one of the new regiments. On this occaſion the ſum of L. 150 Sterling was advanced by his father to levy his complement of recruits. He was likewiſe furniſhed with cloaths, a ſilver-watch, and other neceſſaries, when he left Scotland. He ſerved in America for the remaining years of his minority, and then brought an action againſt his elder brother, the preſent Craigniſh, as repreſenting his father, for the contents of the bond. The defender claimed a deduction of the money advanced for his brother. Againſt which

The purſuer *pleaded:* When a father grants a bond of proviſion, payable at a diſtant period, and becomes bound in the mean time to maintain and educate his child, there is an implied obligation to ſet him out in due time to ſome employment or buſineſs, in which he may earn his bread in the future part of his life. The father, in this caſe, by procuring an enſigncy for the purſuer, did no more than fulfil this obligation. *2do*, Had the purſuer, inſtead of entering into a military life, remained at college, a much larger ſum than was here advanced muſt have been expended in his ſupport. Since his joining the regiment he has ſubſiſted ſolely upon his pay. He is therefore entitled to compenſate the claim here made out of the funds ſo ſaved.

Anſwered for Craigniſh: The plea here maintained for the purſuer, if recogniſed by courts of law, would be attended with very heavy conſequences to parents and their general repreſentatives. It would in the end be exceedingly prejudicial to the intereſts of younger children, by diſcouraging parents from advancing them in the world before their proviſions are exigible. A father is no doubt obliged to maintain his younger children till their proviſions become due; and to prepare them for ſome employment ſuitable to their rank and abilities, conſtitutes a very conſiderable part of this obligation. But under this cannot be included a duty to procure for them a permanent eſtabliſhment

eſtabliſhment in life. No court of law would oblige a father on this ground to purchaſe for his child an annuity, a ſhare in a mercantile company, or a commiſſion in the army. Where a father, therefore, makes ſuch a purchaſe, he is ſurely entitled to credit for it, and to have recourſe to the general rule of law, That *debitor donare non præſumitur.*

The ſecond branch of the purſuer's argument ſeems ill founded in many reſpects. The father's obligation to aliment ceaſed, when the ſon, without incroaching upon his proviſion, was enabled to ſupport himſelf. It was a poſſible caſe, that an enſign's commiſſion, ſo far from defraying the young gentleman's expences, might have expoſed the father to a greater diſburſement than was neceſſary to ſupport him at home. The father too, by making theſe advances before the proviſion became due, ran the riſk of loſing the whole by his ſon's death. All the length, therefore, that this plea of compenſation can go, is to take away any claim for annualrent on the ſums advanced, and accordingly no demand has been made by the defender on this account.

" The Lord Ordinary found, " That the articles furniſhed by the " late Craigniſh in the recruiting ſervice, and for fitting out the pur- " ſuer, were to be imputed in payment, *pro tanto*, of the bond of " proviſion at the time the bond fell due."

Againſt this interlocutor Smollet Campbell reclaimed. " The Lords, " after adviſing the petition, with anſwers for Craigniſh, adhered; " but remitted to the Lord Ordinary to hear parties procurators on " any objections they might ſtill have to any of the particular ar- " ticles of the account, and to do therein as he ſhould ſee cauſe." And it ſeemed to be the opinion of the court, when making this remit, that Craigniſh's claim ſhould only be ſuſtained as to the ſums advanced in the recruiting ſervice.

Lord Ordinary, *Alva.* Act. *Abercromby.* Alt. *B. W. Macleod.* Clerk, *Robertſon.*

C.

N° XXXVIII.

N° XXXVIII. *February* 21. 1782.

Sir ROBERT HENDERSON,

AGAINST

Captain GEORGE MAKGILL, and others.

COMMONTY. *Whether the proprietor be entitled to a* præcipuum *in the diviſion of one.*

IN the proceſs of diviſion of the commonty of Lucklawhill, Captain Makgill, as ſole proprietor, claimed, *tanquam præcipuum*, a ſhare, excluſive of that which fell to him in virtue of the ſtatute 1695, and endeavoured to enforce his plea by the following authorities: Craig, *De Feud. lib.* 2. *dieg.* 8. § 35.; Lord Stair, b. 4. tit. 3. § 12.; Lord Bankton, b. 1. tit. 8. § 36.; Erſkine, b. 3. tit. 3. § 57. 58.; Remark. Deciſ. 7th January 1724, Hogg *contra* Earl of Home.

The Lord Ordinary "found, That Captain Makgill was not entitled, by virtue of his right of property, to any *præcipuum* in the "diviſion, but that he had thereby a right to coals, mines, minerals, "and other foſſils that might be under the ſame."

To this interlocutor, on adviſing a reclaiming petition for Captain Makgill, without anſwers, the Court adhered, reſerving to him to claim that part of the commonty which ſhould remain after the reſpective ſhares had been allotted to all the parties having intereſt.

Lord Ordinary, *Alva.* For Captain Makgill, *M'Cormick.*

S.

N° XXXIX. *February* 28. 1782.

RUTHERFORD,

AGAINST

RANKINE and LEES.

RECOMPENCE. *Whether a party, whoſe right was only temporary, and has been ſet aſide, has a claim for meliorations.*

RANKINE poſſeſſed a tenement in the town of Cupar in Fife, by virtue of a diſpoſition in ſecurity, upon which adjudication had followed. It conſiſted of a houſe, rented at L. 20 Scots, a ſmall garden,

garden, and a ſpace where a houſe had formerly ſtood, but which, for time immemorial, had been uſed as a dunghill-ſtead.

Rankine having repaired this tenement, obtained decreet of cognition from the Dean of Guild of the burgh, aſcertaining the amount of the money laid out to be L. 52 : 15 : 6 Sterling.

Rankine afterwards transferred his right to Lees, who built a handſome houſe upon the waſte ground. The expences of this building, amounting to L. 366 : 19 : 3 Sterling, were in like manner aſcertained by the Dean of Guild.

Some years thereafter, Rutherford having made up titles by ſervice to the property of theſe ſubjects, brought, and was ſucceſsful in an action for ſetting aſide the right of Rankine and Lees. The queſtion then occurred, to what extent the defenders were entitled to the ſums laid out by them on theſe ſubjects?

Pleaded for the purſuer: The general rule of law is, "*Inædificatum "ſolo cedit.*" This rule, applied to caſes like the preſent, is ſupported by the moſt obvious principles. Where a perſon builds on ground which he knows to be the property of another, he either does ſo in the view of the advantages which he is to reap from it during his own poſſeſſion, or with an intention of making a donation to the proprietor; l. 7. § 8. *Dig. De acquirend. rer. domin.* A contrary idea would oblige the proprietor, either to purchaſe what was uſeleſs to him, or unſuitable to his circumſtances, or to part with his property againſt his inclination. The judgments of the Dean of Guild can in no way better the defender's plea. No law has authoriſed that officer to alter the nature of a ſubject within burgh, or to grant warrant for building on grounds not occupied with houſess; and in the preſent caſe, theſe judgments were not obtained by way of warrant, but as a ſpecies of proof, taken *ex parte*, of the expence actually laid out.

Anſwered for the defenders: The tenement in queſtion was underſtood to be impignorated for a debt fully adequate to its value. Upon this ſecurity, confirmed by an adjudication, the creditors, conſidering it as a ſubject which the proprietor would never be at pains to claim, have expended large ſums in making it uſeful and ornamental to the burgh. It would therefore be againſt the plaineſt principles of juſtice and expediency, that the purſuer ſhould be allowed to aſſume to himſelf theſe buildings, which are many times more valuable than his property, without refunding to the defenders what he has profited by their operations.

The Lords were of opinion, That the defenders were entitled to what the purſuer was actually *lucratus* by theſe meliorations, and remitted to the Lord Ordinary to proceed accordingly.

Lord *Covington*, Reporter. Act. *Croſbie*. Alt. *Geo. Wallace*. Clerk, *Menzies*.

C.

N° XL. *March* 1. 1782.

GEORGE Earl of DALHOUSIE, as Adminiſtrator-in-law for the Honourable WILLIAM RAMSAY-MAULE, his ſecond Son,

AGAINST

Lieutenant THOMAS MAULE.

PRESCRIPTION—*poſitive and negative. Whether effectual, againſt an entail, of lands, when the preſcriptive title is anterior, and when poſterior, to the entail; againſt an entail of a perſonal bond; and of leaſes.*

PRESUMPTION—*of delivery of a deed.*

A Competition of brieves occurred between the Earl of Dalhouſie, as adminiſtrator-in-law for his ſon, and Lieutenant Maule; each of them claiming the right of ſervice as heir to the late William Earl Panmure, in certain entailed ſubjects, which had belonged to his Lordſhip's uncle, James Earl of Panmure, who was attainted of high treaſon for his acceſſion to the rebellion in 1715; or of which Mr Harry Maule, brother of the latter, his Lordſhip's father, had been proprietor. Of theſe ſubjects, together with the manner in which they came into his Lordſhip's perſon, the following is an account:—

In 1713, James Earl of Panmure granted a bond for L. 10,000 in favour of the Counteſs, his Lady. This bond, in 1723, ſhe aſſigned to Mr James Maule, eldeſt ſon of Mr Harry Maule; who, at the ſame time, came under an obligation to create a ſubſtitution, on the failure of heirs-male of his own body, in favour of his immediate younger brother William, afterwards Earl Panmure, and the other heirs-male of the body of Mr Harry Maule. Upon the death of James in 1729, William, having ſerved heir in general to him, completed a title to this bond.

In 1724, the Counteſs obtained from the York-buildings Company, then in the right of the eſtate of Panmure, a leaſe of the houſe and parks belonging to this eſtate, for the endurance of ninety-nine years. This leaſe, in the ſame manner, ſhe aſſigned to Mr Harry Maule.

Of the houſe and parks of Brechin, her huſband being then dead, ſhe enjoyed a liferent-right by her contract of marriage; and theſe the Company, at the ſame time, ſet in leaſe to Mr Harry Maule himſelf for ninety-nine years, to commence at the Counteſs's death.

Mr Harry Maule was likewiſe proprietor of the eſtates of Kelly and of Ballumbie. In 1727, he diſponed the latter to James his eldeſt ſon; after whoſe death, William, in 1729, ſerved himſelf heir in ſpecial, of tailzie and proviſion to him, in this eſtate, and was infeft upon a precept from the Chancery. The eſtate of Kelly was conveyed to William, by a deed of entail, of the ſame nature with that of ſeveral other ſettlements material to the preſent queſtion; the particulars reſpecting all which are therefore now to be mentioned.

In

In 1730, the family of Panmure ſeemed to have united in the purpoſe of preſerving the ſucceſſion to their whole property in the male line. On 14th April, accordingly, Mr Harry Maule, with the advice and conſent of William, above mentioned, his eldeſt ſon, and of another ſon, John, afterwards one of the Barons of Exchequer in Scotland, executed a deed of entail of his lands of Kelly, " in favour " of himſelf, of William his eldeſt ſon, of John his youngeſt ſon, " and of Dr Henry Maule, Lord Biſhop of Cloyne, in the kingdom " of Ireland, his next heir-male, and the heirs-male of his body." This deed contains the uſual prohibitions againſt altering the courſe of ſucceſſion.

Of the ſame date, an obligation was executed by William; by which he engaged himſelf to beſtow L. 9000 of the ſum recovered upon the L. 10,000 bond above mentioned, in the purchaſe of lands, to be ſecured in favour of the ſame ſeries of heirs, and under the ſame limitations; or otherwiſe to grant a diſpoſition in their favour of the ſum itſelf.

On the 24th April 1730, being then in the right of the eſtate of Ballumbie, he, with conſent of his brother John, executed a ſimilar entail of this eſtate.

Upon 8th June 1730, Mr Harry Maule granted an aſſignation of the leaſe of Brechin in favour of the ſame ſeries of heirs, and under the ſame prohibitions. And, in October following, the Counteſs and Mr Harry Maule concurred in a ſimilar deed, reſpecting the leaſe of Panmure.

Of the entails of Kelly, of Ballumbie, and of the leaſes, two duplicates were ſigned.

Previouſly to the above mentioned deeds of entail, William ſtood veſted in the right of the bond, and of the eſtate of Ballumbie. On his father's death in 1734, he made up a title to the eſtate of Kelly, as his heir-male, of line and proviſion, according to the deſtination contained in Mr Harry Maule's inveſtitures, dated as far back as 1687.

Soon after the execution of theſe deeds of entail, that of the bond, and a duplicate of each of the others, were put into the hands of John, the firſt nominee after William; one of each of the other duplicates remaining in Mr Harry Maule's cuſtody, and of which, after his death, William allowed John to keep poſſeſſion.

From 1745 downwards, however, William, then Earl Panmure, made ſettlements, or renewed the inveſtitures of his eſtates, free from the limitations of the entails. In 1775 he executed a new ſettlement of the whole " in favour of himſelf and his brother John, then a Ba- " ron of Exchequer, and of George Earl of Dalhouſie his nephew, " in liferent, and his ſecond and other ſons, in their order, in fee."

Mr Baron Maule died in July 1781; when, in his repoſitories a codicil was found, by which " he bequeathed to Lieutenant Maule, " under the denomination of Thomas Maule, Eſq; grandſon to the " deceaſed Dr Henry Maule, Lord Biſhop of Meath, in the kingdom " of Ireland, the whole of the above deeds ſpecially mentioned, of " which he retained the cuſtody."

There were likewiſe lying in his repoſitories the duplicates of which Mr Harry Maule had had the poſſeſſion; and alongſt with

theſe

theſe a memorandum, expreſſing the above particulars reſpecting them.

Lord Dalhouſie, as adminiſtrator-in-law for his ſon the Honourable William Ramſay, obtained a brieve, directed to the macers of the Court of Seſſion, for ſerving his ſaid ſon heir of tailzie and proviſion to Lord Panmure, in virtue of the deed of ſettlement laſt mentioned. Lieutenant Maule, on the other hand, procured one, directed to the Sheriff of Edinburgh, for ſerving him likewiſe heir of tailzie and proviſion to Lord Panmure, in terms of the aforeſaid ſeveral deeds of entail. This brieve, which was advocated to the macers, at Lord Dalhouſie's inſtance, they, with advice of their aſſeſſors, adjourned, until the determination of the claims of the parties by the whole Lords; and appointed informations upon the matters in controverſy: After which a hearing in preſence was ordered by the Court; when it was

Pleaded for the Earl of Dalhouſie: The different deeds on which Lieutenant Maule founds his claim, are not to be conſidered as having ever been effectual ſettlements. From their dates, to the death of Mr Baron Maule, they remained in obſcurity, without having been applied to any uſe whatever. Though they may evince that a deſign had exiſted in ſpeculation, of carrying them into execution; yet it is certain that no effect has been given to them.

But, ſuppoſing them once to have been effectual, it is clear that, having been framed in 1730, and lain dormant till 1781, they are now all extinguiſhed by the negative preſcription; and the ſubjects of them, the bond excepted, having been, during the whole, or a ſufficient part of the intervening period, poſſeſſed on other titles, are now ſecured by the poſitive. For, that preſcription, whether poſitive or negative, has the effect to exclude the limitations or irritancies of an entail, is apparent from the ſcope of the ſtatutes which have introduced theſe preſcriptions. With reſpect to the negative, an entail is to be viewed as creating an obligation on the heir poſſeſſing the eſtate in favour of the ſubſequent heirs entitled to the ſucceſſion; and ſuch an obligation is preciſely the ſubject of the ſtatute on which this preſcription is founded. The application of the other ſtatute requires no explanation. This doctrine accordingly is eſtabliſhed, by the deciſions of this Court and of the Houſe of Peers:—Of this Court, in the caſes of Macdougal of Mackerſton, 10th July 1739, Clerk Home; of Porterfield *oontra* Porterfield, in 1771; and Pollock, *contra* Lockhart of Lee, in 1777:—Of the Houſe of Lords, in that of Ayton *contra* Monipenny, 31ſt July 1756, Fac. Coll.:—And of both Courts in thoſe of Douglas of Kirkneſs, in February 1753, Kilker.; of Bruce-Carſtairs *contra* Miſs Anne Bruce, in 1770 and 1772; of Leſlie Grant *contra* Gordon, 25th January 1769; and of the Duke of Hamilton *contra* Mr Douglas, in 1776.

Nor ought the objection of *non valentia agendi cum effectu*, to be urged by Lieutenant Maule. Though the ſubſtitute heirs could not by any action have attained poſſeſſion of the entailed ſubjects; yet they had an intereſt and a title to maintain every proper ſuit for making the tailzies effectual, and for obliging the heir in poſſeſſion to hold it under them; Erſkine, b. 3. tit. 7. § 37.; and Deciſ. *ſup. cit.*; notwithſtanding

ing that, from two old deciſions reported by Fountainhall and Harcarſe, a contrary principle ſeems to have been formerly admitted.

Neither can it be reaſonably ſaid, that while the ſame perſon is heir on different titles, he is not to be ſuppoſed, by ſetting up one in oppoſition to the other, to preſcribe againſt himſelf. If both titles were equally unlimited, the obſervation might be juſt; as in the caſe of Smith and Bogle againſt Gray, 30th June 1752, Kilker.; becauſe then nothing would be acquired or loſt. But an immunity from the fetters of an entail, is a very ſubſtantial intereſt to be the ſubject of preſcription, poſitive or negative. Both preſcriptions, therefore, have operated equally to extinguiſh thoſe limitations contained in the above mentioned deeds; all but the bond, cut down by the negative alone, not being ſuſceptible of the poſitive.

Anſwered for Lieutenant Maule: The tailzie of the bond, and duplicates of the other deeds, were found in the cuſtody of Mr Baron Maule, the perſon immediately intereſted to receive them; and it is to be preſumed, agreeably to his own declaration, that he obtained them by means of a fair delivery. Duplicates, accordingly, of thoſe deeds which it was neceſſary to retain as titles of poſſeſſion, were made, in order that the poſſeſſor and the next heir might each of them hold one; whereas that relative to the bond, affording a right to none but the creditor, did not require any duplicate. Thus the plea of latency appears to be without any foundation.

That of preſcription ſeems likewiſe to admit a ſatisfactory anſwer. With reſpect to the negative, it is not to be urged againſt a perſon for not having brought upon his right a ſuit from which he could not derive any benefit. Baron Maule was not only heir in the entails, but alſo in the prior inveſtitures. Lord Panmure, too, was either inſtitute or maker of the entails. From no action, therefore, relative to thoſe ſettlements could they receive any advantage; and thus, *quoad* them, the negative preſcription could have no place, as they were evidently *non valentes agere cum effectu*; and having no effect againſt them, as little could it have againſt the poſterior ſubſtitutes; agreeably to the deciſions of the court, Harcarſe, 22d November 1687, Somerville *contra* Ingleſton and Tennent; Fountainhall, 31ſt December 1695, Innes *contra* Innes. Nor could any of the ſubſtitutes have obtained a declarator of irritancy, becauſe the deeds of entail conferred not that power; and though a compulſatory upon the heir in poſſeſſion to make up titles under thoſe deeds, might have bettered the condition of the ſubſtitutes, even that was impracticable with regard to the leaſes, as it was not neceſſary to have poſſeſſed theſe by any other title than apparency alone. The *non valentia* therefore reſpecting them is even ſomewhat ſtronger than it is as to the other ſubjects.

With regard to the poſitive preſcription, it is to be remembered, that the late Earl Panmure, either made, or conſented to the making of all the entails; and it would be an inconſiſtent idea, to imagine that the poſſeſſion held by himſelf were in oppoſition to his own deeds; tho', no doubt, his poſſeſſion might have prevailed againſt the deeds of another; whence ariſes the diſtinction between the preſent and all the caſes quoted by the Earl of Dalhouſie. Beſides, as to Ballumbie in particular, the title in the perſon of the Earl being prior to the tailzies, and therefore not a contravention of thoſe ſettlements,

no inconſiſtency would occur from barely continuing his former poſſeſſion. With reſpect to the leaſes, though theſe might have been poſſeſſed under apparency alone, if no more complete title had exiſted in the poſſeſſor; yet as ſuch a title was contained in the entail of this ſubject, ſo to that the poſſeſſion muſt be aſcribed, and of courſe the claimant's right be ſo far admitted.

The unanimous opinion of the Court was, That the entails were not to be conſidered as latent, but as delivered deeds, which had once been effectual: but that as it was a poſition firmly eſtabliſhed by the deciſions above quoted, that the fetters of an entail may be cleared off by the courſe of preſcription, either poſitive or negative; ſo in this caſe the entail of the bond had been extinguiſhed by the negative preſcription, not admitting the poſitive, as that of Kelly had been by both preſcriptions.

The general opinion of the Lords, was the ſame with regard to the entail of Ballumbie; ſome of them, however, adopting the diſtinction founded on the priority of the preſcriptive title; but it was different reſpecting the leaſes, againſt which preſcription was not deemed effectual.

On this point the following obſervations were made: Leaſes, tho' none of the objects of the act 1685, may yet be ſettled by entail; of which, however, very few inſtances have occurred. They are likewiſe capable of preſcription; but to the preſent caſe preſcription is not applicable. No man is bound by law to inſtitute any action where there is nothing to be the object of it, but merely that of interrupting preſcription. He is then *non valens agere.* A ſubſtitute heir of entail has indeed a *jus crediti* to entitle him, and he has an intereſt to oblige the heir in poſſeſſion to expede charter and ſeiſin upon the entail, and to poſſeſs under theſe; but as in the preſent caſe the aſſignment alone formed a ſufficient title, and admitted no farther completion, there was nothing to be the ſubject of an action at the inſtance of any of the ſubſtitute heirs. If then, in this caſe, the courſe of preſcription could not by any action have been ſtopped, it would be a ſoleciſm to denominate theſe ſubſtitutes *valentes agere cum effectu.*

" The Lords found, That the deed of tailzie executed by the de-
" ceaſed Mr Harry Maule of Kelly, with conſent therein mentioned,
" in the year 1730, of his lands and eſtate of Kelly, and alſo the deed
" of tailzie executed by the late William Earl Panmure, in the afore-
" ſaid year, of his lands and eſtate of Ballumbie, are cut off by the
" poſitive and negative preſciption; and that the obligation for em-
" ploying L. 9000 Sterling, executed by the ſaid William Earl Pan-
" mure in the aforeſaid year, is cut off by the negative preſcription:
" That the ſaid William Earl Panmure had full power to make the
" deed of tailzie executed by him in favour of the ſaid Mr William
" Ramſay-Maule, and his adminiſtrator-in-law: That the ſaid Mr
" William Ramſay-Maule was entitled to be ſerved heir of tailzie and
" proviſion to the ſaid deceaſed William Earl Panmure, his grand-
" uncle, in virtue of the foreſaid deed of tailzie in his favour; and
" remitted to the macers to proceed in his ſervice accordingly on
" the brieve brought before them by him and his adminiſtrator-in-
" law: They farther found, That the ſaid Lieutenant Thomas Maule

" had

" had right to take up the leaſes of the houſe and parks of Panmure, " and houſe and parks of Brechin; and remitted to the macers to " proceed in his ſervice, in ſo far as regards theſe two leaſes; but " that he was not entitled to be ſerved heir-male of tailzie and pro- " viſion to the ſaid William Earl Panmure, in virtue of the deed of " tailzie of the eſtate of Kelly, executed by the ſaid Mr Harry Maule, " nor in virtue of the deed of tailzie of the eſtate of Ballumbie, exe- " cuted by the ſaid William Earl Panmure; and that his ſervice on " the brieve taken out by him could not proceed with regard to the " ſaid eſtates of Kelly and Ballumbie; and remitted to the macers to " diſmiſs the ſame accordingly, in ſo far as concerned theſe two " eſtates."

For the Earl of Dalhouſie, *Solicitor-General, Ilay Campbell, Elphinſton.*
For Lieutenant Maule, *Wight, Croſbie, Al. Ferguſon.* Clerk, *Robertſon.*

S.

N° XLI. *March* 1. 1782.

MARSHALL and RUTHVEN,

AGAINST

JEAN WIGHT.

INFEFTMENT. *How an adjudger of a diſpoſition, containing a procuratory of reſignation, but no precept of ſeiſin, muſt obtain infeftment.*

CUMING having right by diſpoſition, containing procuratory of reſignation, to a houſe in Edinburgh, diſponed it, in the year 1771, to Beveridge; and, for completing his right, aſſigned to him the unexecuted procuratory.

Meſſ. Marſhall and Ruthven, creditors of Cuming, in the year 1777, deduced an adjudication againſt this ſubject; and thereon obtained infeftment from the magiſtrates of Edinburgh.

In the year 1779, Mrs Wight, as repreſenting Beveridge the diſponee, executed the procuratory, and was infeft. A proceſs for ſelling Cuming's ſubjects, including this houſe, having been commenced, Mrs Wight inſiſted that it ſhould be excepted; and

Pleaded: The common debtor's right to this houſe was only perſonal, conſiſting of a diſpoſition, and an unexecuted procuratory. An adjudication againſt him could only carry that right, and could no more warrant the infeftment which followed, than a diſpoſition containing a procuratory could entitle the diſponee to take infeftment without reſigning on the procuratory. The infeftment was therefore inept and void; and the adjudication being thus reduced to a perſonal right, cannot compete with the complete feudal title in the

the perſon of Mrs Wight. The proper ſteps to have been purſued by Marſhall and Ruthven, in this caſe, for completing their diligence, were, to have recovered the procuratory in favour of the debtor, and, upon their adjudication, and that evident, to have made reſignation in the hands of the magiſtrates; or, in conſequence of the perſonal right veſted in them by the adjudication, to have led an adjudication in implement againſt the author laſt infeft.

Anſwered for Marſhall and Ruthven: A creditor obtaining a general adjudication is never in poſſeſſion of his debtor's title-deeds; and without theſe he cannot, like a voluntary diſponee, perfect his right according to ſtrict feudal principles, by executing unexecuted procuratories, and completing his title to other perſonal rights, on which the ſubject adjudged may have been poſſeſſed for centuries, and by a variety of proprietors. Nor can the expedients ſuggeſted by Mrs Wight remove theſe difficulties. It has been found, Spottiſwood, *voce* Exhibition, that a debtor is not obliged to produce a progreſs; neither is it probable, that he would readily fulfil an obligation of this kind to a creditor adjudging his eſtate. And as a purſuer in an action of adjudication in implement, muſt libel the titles of the perſon laſt infeft, the ſame obſtacles would there occur to an adjudger of a perſonal right, which have obliged the creditors in this caſe to take an infeftment directly from the magiſtrates.

But there muſt be a mode known in law, by which real rights, whether complete or not, may be attached by the diligence of creditors: and the feudal forms, in this matter, as in all others, muſt be accommodated to the exigencies of the country where it is introduced. Hence, although a voluntary diſponee in a burgage-tenement muſt make up feudal titles by reſignation; yet an adjudger may obtain infeftment upon the title of his adjudication alone. Indeed, there appears no greater ſtretch in the law's authoriſing an adjudger from a perſon not infeft to obtain infeftment without the circuit of reſignation, than where the debtor was actually infeft. In both caſes, the law does for the debtor what the debtor ought, but declines to perform: and the interpoſition in both is abſolutely neceſſary for the ſatisfaction of creditors. This argument is ſupported by the uniform ſtyle of decreets of adjudication; which, without regarding whether the debtor was infeft or not, directs "the adjudger "to be infeft by the immediate lawful ſuperior, on a charge of "twenty-one days, in the ſame way as the debtor, and his prede-"ceſſors and authors, have holden, or might have holden, the ſame." And it is likewiſe confirmed by the conſtant practice in ſuch caſes, proved by certificates from the clerk of Chancery, and one of the principal clerks of the city of Edinburgh, bearing, that charters of adjudication, which, by the form of theſe writings in burgage tenures, contain both charter and infeftment, are expede in the manner followed in the preſent inſtance, whether the debtor's right was perſonal or otherwiſe.

Replied for Mrs Wight: A creditor, truſting to one in the perſonal right of a feudal eſtate, is no doubt in a worſe ſituation than one whoſe debtor is infeft. But that is an inconveniency to which he has expoſed himſelf, and from which he can no more be relieved, on principles

principles of equity, than a creditor of an apparent heir, who, without the formalities required by law, has attempted to attach an eſtate not veſted in his debtor by ſervice. The certificates produced have been obtained from perſons who are miniſterially employed in expeding charter of adjudication and reſignation, but who have no acceſs to know in what manner parties obtaining theſe charters have completed their rights. Far leſs can theſe certificates go the length of eſtabliſhing, that an infeftment taken in the manner here adopted would be ſuſtained in a court of law.

The Lords ſuſtained the objection to the infeftment founded on by Marſhall and Ruthven.

Lord *Alva*, Reporter, *Rae*, *Mat. Roſs.* For Mrs Wight, *Ilay Campbell*, Clerk, *Orme.* For Marſhall and Ruthven, C.

N° XLII. *March* 5. 1782.

THOMAS TWEEDIE, and others,

AGAINST

HENRY GIBSON.

BILL OF EXCHANGE. PRESCRIPTION. *Liberal interpretation of the act* 1772, *which introduced the ſexennial preſcription of bills.*

GIBSON, in April 1772, granted to Ewart, of whom Tweedie and others were executors, a bill for L. 102, payable ninety days after date. In June 1778, within ſix years from the term of payment, Tweedie, and the other executors, ſued Gibſon for the contents of this bill.

Pleaded for the defender: By act 1772, § 37. it is declared, "That "no bill of exchange, or inland bill, or promiſſory note, executed "after the 15th May 1772, ſhall be of force, or effectual to produce "any diligence or action, in that part of Great Britain called *Scot-* "*land*, unleſs ſaid diligence ſhall be raiſed thereon, within the ſpace "of ſix years from and after the terms at which the ſums in ſaid "bills or notes became exigible."

And with reſpect to bills or notes granted before the ſaid 15th May 1772, it is, by § 38. enacted, "That theſe ſhould not be of force, "or effectual to produce any diligence or action, unleſs ſuch dili- "gence has been raiſed, or action has commenced thereon, before "the expiration of ſix years from and after the ſaid 15th day of May "1772."

Thus it is evident, that this ſtatute has made only one diſtinction reſpecting the period when the preſcription commences; which is that between bills prior and thoſe poſterior to 15th May 1772; the

period of commencement being in the former that date, and in the latter the term of payment. This diſtinction is laid down free from any ambiguity; nor is a court of law at liberty to depart from ſuch a clear and diſtinct enactment. Now, as the bill in queſtion was granted previouſly to 15th May 1772, and when the preſent action was inſtituted, ſix years after that date had already elapſed, it is clear, from the above cited ſection 38. that it was then precluded by the ſtatutory limitation; notwithſtanding the term of payment did not arrive till afterwards.

Anſwered: It follows immediately from the general nature of preſcription, that its courſe cannot begin againſt a creditor till after the term of payment, becauſe then only the obligation becomes exigible. It is likewiſe an undoubted rule, That every ſtatute ought to be interpreted in conſiſtency with itſelf, *tota lege perſpecta*. Now, as the object of the ſtatute in queſtion, which is apparent from ſection 37. was to limit the endurance of the obligation created by bills to ſix years, but to no ſhorter a period; and as it is plain, that this limitation cannot take place before the debt becomes due, ſo ſection 38. is to be interpreted agreeably to ſection 37. and in ſuch a manner as to permit ſix years to elapſe after the term of payment of bills granted before May 1772, as well as of thoſe poſterior to that period.

Obſerved on the Bench: The preſent caſe, that of a bill granted before the period mentioned in the act, but not payable till afterwards, has not been provided for by the ſtatute.

The Lords repelled the defence founded on the ſtatute above mentioned.

Lord Ordinary, *Braxfield.* Act. *Maclaurin.* Alt. *Ilay Campbell.*
Clerk, *Menzies.*

S.

N° XLIII. *March* 10. 1782.

MARGETSON,

AGAINST

The PROCURATOR-FISCAL and CLERK of the High Court of ADMIRALTY.

DUES—*exigible by the officers in the Court of Admiralty in queſtions of prize.*

MARGETSON having captured an American veſſel, obtained ſentence condemning the ſame as lawful prize, in the High Court of Admiralty; and demanded an extract of this ſentence, upon payment of the uſual dues.

The

The Judge-Admiral found, "That as the prize was of conſider-
"able value, the captors were liable, to the deputy-clerk of court,
"for behoof of all concerned, in the ſum of L. 40 Sterling; and
"that over and above the ſums paid as the dues of extract."

In an advocation of this judgment, the Lords

Found, "That the officers in the Court of Admiralty, in que-
"ſtions of prize, were entitled to no more than the ordinary
"dues of court."

Lord *Kennet*, Reporter. Act. *Henry Erſkine.* Alt. *Monro.*

C.

N° XLIV. *June* 15. 1782.

JEAN-VYES CAMPBELL, Petitioner.

SEQUESTRATION—*awarded of an eſtate brought under ſale by an apparent heir.*

THE petitioner, as apparent heir of her father, brought a proceſs for ſelling his eſtate, in terms of the ſtatute 1695. After this proceſs had been called in court, and a proof allowed of the rental, debts, &c. ſhe applied for a ſequeſtration of the lands.

The Lords conſidered the anceſtor's eſtate, by the depending proceſs of ſale, to be equally *in manibus curiæ* with one brought under ſale by creditors, by virtue of the ſtatutes 1681 and 1690; and therefore awarded the ſequeſtration.

For the Petitioner, *Honyman.*

C.

N. B. See a contrary Deciſion, Auguſt 1781; Blackwoods Petitioners.

N° XLV.

N° XLV. *June* 19. 1782.

JOHN WATSON,

AGAINST

SARAH MARSHALL, and others.

SERVICE AND CONFIRMATION. *A bond of corroboration, granted to the heir of the creditor, ſupplies the want of confirmation.*

INHIBITION,—*whether it ſtrikes againſt ſuch a bond.*

BARCLAY was a creditor of Henry Alcorn by bond. Jean Crookſhank, decerned executrix-dative *qua* neareſt of kin to Barclay, ſued James Alcorn, as repreſenting Henry his grandfather, for payment of that debt. Crookſhank, however, did not expede a confirmation; but during the dependence of the action obtained from James Alcorn a bond of corroboration of the original bond, upon which ſhe obtained decreet, and afterwards led an adjudication.

Prior to this bond of corroboration, Sarah Marſhall, another creditor, had executed inhibition againſt Alcorn.

In the ranking of Alcorn's creditors, Watſon, in the right of Jean Crookſhank, produced, as his intereſt, the adjudication obtained by her; to which Sarah Marſhall, and the other creditors of Alcorn,

Objected: Firſt, That Crookſhank not having obtained confirmation, was never veſted in the right of the debt. But

The Lords having conſidered the bond of corroboration as ſupplying the want of confirmation, and repelled the objection;

Marſhall *next objected:* The above mentioned bond of corroboration, the only title upon which the decreets of conſtitution and of adjudication proceeded in favour of Jean Crookſhank, was poſterior to the inhibition in queſtion, and therefore is void *quoad* the inhibitor; the granting of that deed being an act entirely voluntary, and which could not by any action have been enforced; Stair, b. 4. tit. 20. § 28.; b. 4. tit. 50. § 11.; Bankton, b. 1. tit. 7. § 138.; Erſkine, b. 2. tit. 11. § 11.; Fountainhall, 29th January 1696, Wilſon and Logan *contra* Penman.

Anſwered: This inhibition did not ſtrike againſt the original ground of debt, which ſtill ſubſiſted. Neither did the corroboration create any new debt; its only effect was, to preſerve againſt preſcription, or to ſave the expence of expeding a confirmation.

The Lords found the inhibition to ſtrike againſt the bond of corroboration, as being poſterior to it, and ſerving to create a title to the prejudice of the inhibiting creditor.

They therefore ſuſtained the objection.

Lord Ordinary, *Alva.* Alt. *Currie.* For the Objectors, *Ilay Campbell, Craig, Mat. Roſs.* Clerk, *Colquhoun.*

S.

N° XLVI.

N° XLVI. *June* 23. 1782.

COWAN and MACGUFFOG,

AGAINST

The MAGISTRATES and COUNSELLORS of the Burgh of Wigton.

TITLE TO PURSUE. *If an ordinary burgeſs may inſiſt in an action for ſetting aſide an election of magiſtrates.*

AN action having been brought by Cowan and Macguffog, as burgeſſes paying ſcot and lot, and exerciſing trades within the burgh, for ſetting aſide the election of magiſtrates and counſellors at the preceding Michaelmas; their title to carry on ſuch action was debated in the following manner.

Pleaded for the defenders: The right of enjoying offices within a burgh, being attended with a degree of rank and power, and a ſpecies of temporary freehold, is without doubt, at common law, the ſubject of litigation before the Court of Seſſion. But this litigation can be maintained by thoſe only who claim a right to theſe offices, or at moſt by thoſe who have voted in favour of particular perſons, and have an intereſt that their vote ſhould be made effectual; it being a general and eſtabliſhed maxim in law, that no man can have any title to bring an action for depriving another of an office, or other matter of right, to which he can have no manner of claim. The legiſlature indeed ſometimes ſees it neceſſary to make certain matters the ſubject of *popular action*, or to infringe the rule to a certain extent, by indulging action to perſons of a particular denomination, as in queſtions touching elections within burghs, to be afterwards more particularly ſtated. But this takes place by virtue of ſpecial enactments, which operate only in the caſes ſpecially provided for. On theſe principles the defenders contend, that the preſent proſecution for annulling an unanimous election of magiſtrates and counſellors, not brought by any perſon laying claim to theſe offices, or having a vote in the election, is utterly inept and incompetent.

Farther, by ſtatute 7th Geo. II. it is declared lawful for magiſtrates and counſellors, apprehending wrongs to have been committed at an annual election, to bring an action before the Court of Seſſion, for rectifying ſuch wrong, within eight weeks after the election. By ſtatute, 16th of the ſame King, the ſame power is given to any conſtituent member of the meeting for election, or of any meeting previous thereto, and may be exerciſed by way of ſummary complaint to the Court of Seſſion, within two kalendar months of the election. By theſe ſtatutes, the legiſlature has eſtabliſhed a code for the regulation of abuſes in the matter of election in burghs, has accurately defined the mode of proſecution, and the perſons having right to purſue; and from thenceforward theſe abuſes muſt either

be rectified under the authority, and in the terms of theſe ſtatutes, or not at all.

With regard to the mode of proſecution, the queſtion has already received an ultimate deciſion. In the year 1765, an action was brought for ſetting aſide an annual election of magiſtrates for the burgh of Eaſter Anſtruther, on the head of bribery. It proceeded in the name of perſons authoriſed by the ſtatutes, but its commencement had been poſtponed till after the term therein preſcribed. The Court of Seſſion, upon proof brought of the corrupt practices, annulled the election. But the queſtion having been brought under review of the Houſe of Peers, the judgment was reverſed, on this ſingle ground, that the mode of redreſs pointed out by the ſtatutes was the only one which could be followed.

The propriety of applying the principle of the foregoing deciſion to the preſent caſe cannot be called in queſtion, without imputing the moſt ſingular improvidence to the legiſlature. It is clear that a ſimple burgeſs, having no voice in the election, cannot purſue in terms of theſe ſtatutes. It is equally clear, that in the maintenance of any action which may be competent to him, his proceedings can no wiſe be reſtrained by theſe ſtatutes. If then theſe enactments have not ſuperſeded all action, which formerly might be competent at the common law, the conſequence is inevitable, that although magiſtrates and counſellors, and others having a vote in an election, after a ſilence for two months, can never be heard to complain; yet an ordinary burgeſs, who has no concern in the election, may inſiſt in his action at any diſtance of time.

Anſwered for the purſuers: Every burgeſs has an intereſt, that the common good of the burgh ſhall be adminiſtrated, and the juriſdiction and power belonging to the magiſtrates exerciſed, by thoſe only who are legally intruſted with that charge. At common law, therefore, the competency of the preſent action, which is calculated to rectify ſeveral glaring abuſes in the election of office-bearers in this community, ſeems not to admit of any argument.

The purſuers do not diſpute, that the ſtatutes of the 7th and 16th of the late King muſt regulate all caſes falling under them. But theſe ſtatutes do not any where expreſsly ſuperſede the common-law remedies. They do not reach every wrong that may be committed in burgh-elections; and as it cannot be thought, that the legiſlature meant to apply a remedy in particular inſtances, and to leave others without the poſſibility of redreſs, ſuch effect ought not to be given to them by implication. Theſe enactments apply only to wrongs committed at the annual elections, and to caſes where there is a majority and minority of electors contending with each other. Hence, when the election has not taken place at the uſual time, which ſometimes happens during civil commotions; or when the wrong is committed during the year, in ſupplying vacant offices, it is inconceivable that there is not, in the law of Scotland, a mean by which any illegal procedure held on ſuch occaſions can be ſet aſide. In the ſame manner, when the electors have unanimouſly choſen perſons incapacitated by the public law or ſet of the burgh, it muſt be allowable for the burgeſſes to maintain action for preſerving the magiſtracy in its proper order,

order, otherwiſe the abuſes committed when the electors are unanimous muſt be without end, and the chuſing of repreſentatives for the burghs, reduced to a ſcene of the moſt corrupt and unconſtitutional practices. In the caſe quoted, as the wrong admitted of a remedy in the form preſcribed by the ſtatutes, the parties neglecting that form might juſtly be precluded from uſing any other. Here the purſuers had no other way to proceed; and they have even complied with the ſtatutes, by commencing their action within the period therein required.

"The Lords diſmiſſed the action as incompetent."

Lord *Kennet*, Reporter. Act. *Hay Campbell, Hay.* Alt. *Rae, Wight.* Clerk, *Home.*

C.

N° XLVII. *June* 24. 1782.

Ranking of the CREDITORS of JARVIESTON.

RIGHT IN SECURITY—*of the penalty in an heritable bond. Whether it gives a preference for neceſſary expences.*

IN this ranking, ſeveral of the creditors by heritable bond were infeft, "in ſecurity of their principal ſums, annualrents, and penalties;" and by virtue thereof claimed to be ranked for the penalties, to the extent of the expences actually incurred, in the ſame claſs in which they were ranked for their principal ſums and annualrents.

The common agent in the ranking

Objected: Were the ſtrict words of the obligation the rule, this claim would be well founded. But that rule would not only juſtify a demand for the whole expences, but alſo for the whole penalty, although no expences had been incurred. Practice, however, has tempered the ſeverity of this ſtipulation, by reſtricting the creditor's claim to the neat expences. And on the like principles, in a queſtion with poſterior creditors, having lent their money on ſimilar ſecurities, a competitor cannot avail himſelf of the ſtrict terms of his infeftment, to the effect of obtaining a preference for the whole expences incurred.

The expences of obtaining infeftment being diſburſed at the ſame inſtant that the ſecurity is created, may be conſidered as a debt then actually exiſting. But beyond that, an infeftment in ſecurity of the penalty is really a ſecurity *for debts not then contracted*, becauſe, if the money be paid at the term, no penalty is due. It is likewiſe exceptionable, as creating an *unknown* and *general* burden on lands, becauſe it cannot be known at any period what expences have been laid out. On all theſe accounts no perſon has any difficulty in lending money upon an eſtate, although the penalties annexed to the debts heritably

heritably ſecured would fully exhauſt the common fund, it being univerſally underſtood, that ſuch ſecurity can go no farther than, at the utmoſt, the expence of infeftments, which is generally paid when the money is advanced, and, at any rate, is exceedingly trifling.

Anſwered: The conventional penalty in bonds for borrowed money, is an agreed modification of the damage the creditor may ſuſtain by delay of payment; and the moment the debtor fails in payment, the penalty is due. From equitable motives indeed, the Court of Seſſion has reſtricted penalties of this nature to the expences laid out by the creditor; but to the penalty thus reſtricted, the creditor has the moſt undoubted claim; and if the ſame be ſecured by an actual and expreſs infeftment, no reaſon can be given why the creditor ſhould not enjoy the benefit of ſuch ſecurity.

The objector has endeavoured to ſupport his plea, by confounding the effects of the infeftments now under conſideration, with thoſe attending rights of annualrent conceived in the ancient form. There a penalty was ſtipulated, and a clauſe intervened, declaring the lands redeemable, upon payment of the principal ſums, annualrents, and penalties; and, by virtue of this clauſe, the debtor could not diſburden his eſtate without ſatisfying the creditor for the expences incurred in recovering his debt. But when an eſtate, ſo affected, was brought to a judicial ſale, this clauſe was not attended with ſuch complete effect. As the penalty was no where ſecured by infeftment, it could not have a place in the ranking as an heritable debt; and the clauſe limiting the faculty of redemption, however effectual againſt the debtor himſelf, was of no avail againſt the purchaſer; who, by the ſtatutes 1681 and 1695, could inſiſt for an aſſignment of the real rights, upon payment of the price, or, in default of ſuch aſſignment, could diſburden the eſtate by conſignation; Bankton, book 3. tit. 2. § 106. To thoſe rights of annualrent, the practice founded on by the objector muſt be limited; *Kilkerran*, 2d February 1739, Creditors of Menzies. In the caſe of an heritable bond, conceived in the terms of theſe under diſpute, matters are totally in a different ſituation. Here the creditor is infeft, expreſsly in ſecurity of his penalty, has a real right in the eſtate correſponding to it; and, in a ranking, is equally entitled to a preference upon it, to the effect of recovering the expences incurred, as he is upon his principal ſum and intereſts.

An infeftment for expences to be diſburſed by no means ſecures any *future* debt, any more than an infeftment for relief of a cautionary obligation. In both caſes the debt exiſts at the time of granting the ſecurity. The diſburſement of the money indeed is poſterior, yet the neceſſity of diſburſing is prior to the ſecurity; and whenever the one party comes under that neceſſity, he is creditor to the other for his indemnification. Nor can an infeftment of this nature be viewed as an *unknown burden*. Its utmoſt extent is much more preciſely defined by the records than the bygone annualrents, which are unqueſtionably *really* ſecured: And the hardſhip which may enſue to poſterior creditors, falling on thoſe who, from the records, might have known the amount of the debts affecting the eſtate, and provided againſt it, is no wiſe comparable to what the prior creditor

ditor muſt be expoſed to if this plea ſhould be ſuſtained; as from thenceforward it will be impoſſible for the moſt ſkilful conveyancer to deviſe a mode by which a perſon, about to lend his money, can ſecure the expences he may be expoſed to in recovering his debt.

The Lords, chiefly moved by the practice alleged by the objector, at firſt diſmiſſed this claim: But as, upon inveſtigation into rankings, the practice appeared in no degree uniform, they altered that judgment, and found, "That the petitioners (the heritable creditors) are preferable upon their heritable bonds to the extent of their neceſſary expences, alongſt with their principal ſums and intereſts; and are entitled to be ranked for the ſaid expence accordingly."

C.

N° XLVIII. *June* 24. 1782.

Ranking of the CREDITORS of JARVIESTON.

RIGHT IN SECURITY—*of the penalty in an heritable bond. When giving a preference for neceſſary expences, what are deemed neceſſary.*

ONE of the creditors, mentioned in the preceding caſe, having advanced the ſum of L. 600 Sterling, obtained an heritable ſecurity to that extent, and at the ſame time an aſſignation to the debts paid with the money advanced by him. One of the debts aſſigned, was a bill upon which arreſtment had been uſed. In diſcuſſing this diligence, the creditor diſburſed a ſum nearly equal to the penalty ſecured by the heritable bond. The queſtion occurred, whether the expence thus laid out, not in following out the heritable ſecurity, but for making a collateral ſecurity effectual, could be imputed to the penalty in the heritable bond as a *neceſſary* expence.

Pleaded for the common agent: No perſon can charge an expence to the penalty in an heritable bond, which was not laid out in the character of real creditor, and in diligence affecting the eſtate. A contrary practice would be inconſiſtent with the nature of an heritable ſecurity; would encourage litigious creditors to load expences upon their debtors; and would defeat the ſecurity of co-creditors, for money actually advanced before theſe expences were diſburſed.

Anſwered: According to the preſent form of an heritable bond, the perſonal obligation ſubſiſts in full force along with the heritable right, and the infeftment is only acceſſory to the perſonal obligation. Whatever, therefore, can be demanded by virtue of the perſonal ſecurity, is effectual againſt the eſtate, in conſequence of the heritable, the one being preciſely commenſurated with the other. Further, every expence, properly laid out in recovering payment of the debt, ought to be included in the penalty, becauſe it conſtitutes a part of the damages ſuſtained by the creditor from delay of payment after the ſtipulated term. And as the whole penalty is, in ſtrict law, incurred whenever the term of payment is elapſed, and as it is only

retrenched, upon equitable conſideration, to the actual expence, it would be highly unjuſt not to ſupport the creditors claim to that extent; Stair, book 4. tit. 3. § 2.

The Lords found, "That the expence laid out in recovering the "contents of a collateral ſecurity, could not be underſtood as a "part of the penalty in the heritable bond."

Lord Ordinary, *Braxfield.* For the Common Agent, *Maclaurin, Henry Erſkine.*
For the Heritable Creditors, *Cullen, Roſs.* Clerk, *Menzies.*

C.

N° XLIX. *June* 25. 1782.

ALEXANDER ROSS,

AGAINST

JAMES CHALMERS.

BANKRUPT,—*act* 1696. *Proof of abſconding.*

LEARMONTH indorſed ſundry bills to Chalmers, in ſecurity of a prior debt, and ſoon after ſtopped payment. On the ſixtieth day poſterior to the indorſation, a meſſenger, poſſeſſed of letters of caption, ſearched the bankrupt's houſe between the hours of eleven and twelve at night, in order to apprehend and incarcerate him, though without ſucceſs.

An action, for ſetting aſide the indorſations above mentioned, was brought by Mr Roſs, as truſtee for Learmonth's creditors; in which the queſtion occurred, whether this execution of ſearch was *per ſe* complete evidence of the bankrupt's having *abſconded*, in terms of the ſtatute 1696.

Pleaded for the defender: The mere abſence of a debtor from his houſe, when a meſſenger intended to have executed a caption againſt him, cannot eſtabliſh this legal qualification of bankruptcy. It is, at the utmoſt, only a circumſtance tending to ſupport ſuch an allegation, and may be elided by proof, that it did not proceed from any purpoſe of avoiding the diligence of creditors. Hence the practice in queſtions of this kind has been, to allow a proof of collateral circumſtances, upon the reſult of which the deciſion is underſtood to depend. This method was followed in the caſes of Finlay *contra* Aitchiſon and Moffat, 26th January 1767, and of James Barry, and others, *contra* the Carron Company, in 1774: And, in the preſent inſtance, the defender offers to prove, that the common debtor left his houſe that day on which his houſe was ſearched, for the purpoſe of viſiting his wife, who at that time reſided with her father.

Anſwered for the purſuer: The intention of abſconding being an act of the mind, is only capable of proof from external circumſtances.

ſtances. When, therefore, the debtor's inſolvency is notorious, and he is under diligence by horning and caption, a ſearch, following on the caption, at his uſual place of reſidence, muſt afford legal evidence of this qualification of notour bankruptcy. Accordingly the general ſcope of the deciſions upon this point has been, to hold this circumſtance as ſufficient; Moodie *contra* Leſlie, 14th November 1764; Fergusſon *contra* Smith, in 1771. Nor can the force of this evidence be removed, by the defender's proving, that the debtor's abſence aroſe from different cauſes, which might be alleged in every caſe, and would in a great meaſure fruſtrate the purpoſes of the act.

The Lords ſeemed to be of opinion, That the execution of ſearch was of itſelf concluſive evidence of the debtor's having abſconded, and could not be redargued by the proof here offered. They therefore

" Suſtained the reaſons of reduction."

Lord *Stonefield*, Reporter. Act. *Mat. Roſs.* Alt. *Maclaurin.*
Clerk, *Menzies.*

C.

N° L. *July* 5. 1782.

THOMAS CONNEL,

AGAINST

HUGH MACLELLAND.

BILL OF EXCHANGE. *Whether a factor, drawing bills, be liable in recourſe to the original creditor; the draught not bearing his character of factor.*

MACLELLAND, in the line of his profeſſion as a mercantile factor, having purchaſed from Connel at Glaſgow, upon the commiſſion of John Learmonth at Leith, a quantity of mahogany, he gave to Connel the following draught on Learmonth: " Three " months after date, pay to Mr Connel, or order, at the houſe of " Sir William Forbes, James Hunter and Company, bankers, Edin- " burgh, L. 260: 13: 7 Sterling, value received. (Signed) HUGH " MACLELLAND: And addreſſed, *To Mr John Learmonth, merchant,* " *Leith.*"

Mr Learmonth accepted this bill; but, before the time of payment, having failed in his credit, Connel uſed diligence againſt Maclelland the drawer; who, in a proceſs of ſuſpenſion,

Pleaded: In this tranſaction Maclelland has no proper concern; he acted merely *factorio nomine* for Learmonth, by whom was received that value for which the bill in queſtion was granted, to whoſe ſole credit

credit the charger truſted, and upon whom only, according to the *res geſta*, and the ſenſe of all parties, an obligation for payment of it could lie. The bill is therefore to be underſtood and interpreted agreeably to theſe circumſtances, known and tranſacted on by the charger himſelf. *Bona fides*, it is true, or ignorance of the *res vere geſta*, might have entitled an indorſee of Connel to claim on this bill. But Connel himſelf, the original party, can plead no ſuch *bona fides*, no ſuch ignorance, no deception againſt which he is to be protected. He is therefore equally bound by the undoubted or confeſſed terms of his own covenant, whether theſe do or do not appear on the face of the bill. In ſhort, this bill in his hands is not to be raiſed by ſpecial privileges above exceptions, founded in the very tranſaction of which itſelf is in part a voucher.

Anſwered: That Maclelland meant to interpoſe his credit for Learmouth, is proved *præſumptione juris et de jure*, by his becoming drawer of the bill. A contrary idea would render narrow the broad baſis of bills, ſo neceſſary for the aid and the ſupport of commerce.

The Court were much moved by this laſt conſideration; and thus had little difficulty in adhering to the interlocutor of the Lord Ordinary, by which it was found, "That though it appeared that Maclelland purchaſed the mahogany not for himſelf, but on account of Learmonth; and though it be true, that a factor purchaſing goods in the name of another, is not himſelf liable for the value of them; yet, as in this caſe Maclelland thought proper to give his own ſecurity to the ſeller, by ſigning a bill as drawer, inſtead of letting the ſeller draw a bill himſelf upon the buyer, he was thereby become liable for the price."

Lord Ordinary, *Monboddo.* Clerk, *Robertſon.* Act. *Sir J. Ramſay.* Alt. *Mat. Roſs.*

S.

N° LI. *July* 5. 1782.

OLIVER MELVIL,

AGAINST

Mr ROBERT ARNOT, Miniſter at Ceres.

MINOR. HOMOLOGATION. *Whether a ſlight act of homologation, occaſioned by the influence of a father, and only a few days poſterior to minority, be ſufficient to bar* reſtitutionem in integrum.

WHILE in the nineteenth year of his age, Oliver Melvil, jointly with his father David Melvil, granted certain bills to Mr Arnot. A ſtate of accounts between the two laſt mentioned gentlemen, of which theſe

theſe bills were articles, having been drawn up, with a doquet certifying its juſtneſs and accuracy, this doquet, only fourteen days after his majority, was ſubſcribed by Oliver, together with his father.

Oliver, on the head of minority and leſion, inſtituted, within the *quadriennium utile*, an action of reduction of theſe bills; againſt which action it was pleaded, That having, when arrived at full age, homologated them, by ſubſcribing the doquet above mentioned, he had precluded himſelf from all claim of reſtitution.

The Lords were of opinion, that the ſalutary privilege of *reſtitutio in integrum*, was not to be barred in a caſe like the preſent, in which the act alleged to infer homologation was of ſuch a ſlight nature; eſpecially as it occurred ſo very recently after nonage, and had proceeded from duty to a father.

They therefore adhered to the Lord Ordinary's interlocutor, "finding no act of homologation on the part of the purſuer ſufficient "to bar reduction; and ſuſtaining the reaſons thereof."

Lord Ordinary, *Weſthall.* Act. *Craig.* Alt. *Hay.* Clerk, *Home.*

S.

N° LII. *July* 21. 1782.

JAMES FINLAY, and others, with concourſe of his Majeſty's Advocate,

AGAINST

The MAGISTRATES and TOWN-COUNCIL of Linlithgow, and the Corporation of Bakers of Edinburgh.

JURISDICTION,—*of the Court of Seſſion, interpoſed to regulate the firlot-meaſure given out by the town of Linlithgow.*

THE ſuperintendence of the weights and meaſures of Scotland had been anciently committed to different burghs of the kingdom. Thus Edinburgh had charge of the meaſure of length, Lanerk of the weights, Stirling of the liquid meaſure, and Linlithgow of the dry meaſure.

The parliament, however, in 1617, ſaw the neceſſity of a general adjuſtment of weights and meaſures, from the diverſity and uncertainty of which heavy complaints had then ariſen; and having appointed a committee to form a plan for that purpoſe, theſe commiſſioners made their report in 1618, which was ratified aud approved by parliament in 1621.

This report aſcertained the ſtandard-quantity of all the weights and meaſures of Scotland. In particular, with reſpect to the Linlithgow firlot or dry meaſure, which for fifty or ſixty years preceding,

had been generally uſed throughout the kingdom, and was preſcribed by parliament as a ſtandard, it declared, that the firlot uſed for meaſuring wheat, rye, beans, peaſe, meal, and white ſalt, in the way of *ſtreak* meaſure, contained twenty-one pints and one mutchkin *of juſt Stirling jug and meaſure*; this jug containing three pounds and ſeven ounces of French Troy weight of clear running water of the Water of Leith. But as it had been cuſtomary to meaſure malt, bear, and oats, by the ſame firlot *heaped*, the committee ordered a new firlot to be made, anſwerable to that increaſe of quantity, without departing from the mode of *ſtreaking*, and to hold thirty-one pints of Stirling meaſure.

The committee likewiſe ſpecified the dimenſions of theſe firlots; which however did not correſpond to the above mentioned contents. Nor, ſo far as is known, were any ſtandard-firlots ever conſtructed in conſequence of theſe directions. On the contrary, the method uſed by the Magiſtrates of Linlithgow, in adjuſting the firlots, which, thus authoriſed, they give out to different parts of Scotland, is merely by emptying into the veſſels the Stirling jug the requiſite number of times.

But of late, it has been thought, that theſe firlot-meaſures exceed the juſt ſtandard; which has afforded matter of complaint to perſons who, by ſelling according to them, muſt ſuffer a loſs proportioned to the exceſs.

Mr Finlay, in particular, and other farmers, from whom the bakers of Edinburgh purchaſed victual by the Linlithgow firlot, inſtituted before the Court, with the concurrence of his Majeſty's Advocate, an action of declarator againſt the Magiſtrates of Linlithgow, and againſt that corporation, in order that the "bakers might be ordained "to deſtroy the falſe firlots which they were then uſing, or to rectify "them according to the legal ſtandard; and that the Magiſtrates, "and their ſucceſſors in office, ſhould be prohibited and diſcharged "from giving out or making any firlots diſconform to the legal "ſtandard in all time coming, under the penalty of L. 10 Sterling "*toties quoties*, beſides being liable in damages as to the time paſt."

In order that the alleged diſconformity between the legal ſtandard and the firlot-meaſures actually iſſued by the Magiſtrates of Linlithgow might be examined, the Lord Ordinary appointed Mr John Robiſon, profeſſor of natural philoſophy in the Univerſity of Edinburgh, to aſcertain that matter by proper experiments.

The reſult of his examination was a report, "That the bear-firlot "contained ten gills and three quarters of water more than the ſtand-"ard or about $2\frac{1}{6}$ *per cent.*; and that the wheat-firlot held of water "two mutchkins more than the ſtandard, which amounts to $2\frac{1}{3}$ *per* "*cent.*;" errors which had ariſen partly from the method itſelf of repeatedly filling and emptying the Stirling jug, and partly from the town cooper's particular mode of filling.

The matter was then laid before the Court upon informations; in which, on the one part, it was objected, that private parties had no title to purſue for the eſtabliſhment, under penalties, of general regulations, nor his Majeſty's Advocate to act as a public proſecutor but in criminal cauſes; and, on the other part, it was anſwered, that

if

if the preſent action were not competent, though the abuſe complained of might in the future be increaſed to almoſt any degree, yet the public, however much aggrieved, could never hope for redreſs.

The Lords pronounced an interlocutor, " aſſoilzieing the Magiſtrates from the claim of damages, and remitting to the ſaid Mr " John Robiſon, and Mr Dougal Stewart, Profeſſor of mathematics, " along with the cooper to the Dean of Guild of Edinburgh, and " the cooper employed by the Magiſtrates of Linlithgow in making " and giving out the ſtandard-firlots, to report their opinion of the " moſt proper mode of regulating the firlot-meaſure by the ſtandard-jug, in terms of the acts of Parliament; and that in ſuch manner as may be carried into execution by any experienced craftſman with a reaſonable degree of exactneſs."

George Clerk-Maxwell, Eſq; one of the Commiſſioners of the Cuſtoms, having afterwards been included in the remit, he, together with Profeſſor Robiſon, reported two different methods of conſtructing with accuracy a firlot-meaſure, agreeable to the legal ſtandard; one of which, being that adopted by the Court in the following interlocutor, was by making uſe of a veſſel calculated to contain a quantity preciſely equal to the preſcribed number of fillings of the ſtandard-jug.

The Lords " repelled the objection to the incompetency, and " found the method preſently uſed by the cooper of Linlithgow in " adjuſting the firlot-meaſure, was erroneous: Found, That the firſt " method propoſed in the report of Meſſ. Clerk and Robiſon, was " proper and right; therefore approved the ſame; and remitted to " the Lord Ordinary to direct a ſtandard to be made conform thereto, at the ſight of Meſſ. Clerk and Robiſon, to be held in all time " coming as the ſtandard firlot-meaſure; and to do therein as he " ſhould ſee cauſe."

Accordingly the Lord Ordinary pronounced judgment as follows: " The Lord Ordinary having conſidered the interlocutor of the " Lords in preſence, with what is above ſet forth, remits to, and " authoriſes the ſaid George Clerk-Maxwell, Eſq; and Profeſſor " John Robiſon, to chuſe and employ an intelligent tradeſman, to " make a ſtandard, at their ſight and direction, agreeable to, and " in terms of the firſt plan or method deſcribed in their report given " in to and approved by the Court: Finds, That the ſaid ſtandard " is to be made uſe of and followed by the Magiſtrates of Linlithgow, as the only ſtandard in ſettling and adjuſting the firlots to " be given out by them, and uſed by the lieges in all time coming; " and which firlots ſo to be adjuſted and uſed, as above, beſides " the former uſual marks or impreſſions put thereon at adjuſting, " the ſame ſhall likewiſe have the mark or impreſſion of the letter " R put thereon, denoting, that the firlots are adjuſted according to " the new and rectified ſtandard aforeſaid; and finds and declares, " That it ſhall not be lawful for the Magiſtrates of Linlithgow, or " any

" any other, to give out new firlots in time coming adjuſted in an-
" other manner."

Lord Ordinary, *Alva.* Clerk *Orme.* Act. *Lord Advocate, R. Dundas.* Alt. *Mat. Roſs.*

S.

N° LIII. *July* 17. 1782.

Mrs MARY DRUMMOND,

AGAINST

Mrs AGATHA DRUMMOND.

CLAUSE. *Import of that of " all eſtate whatſoever, perſonal and " real."*

PRESUMPTION—*of revocation.*

MR DRUMMOND of Blair-Drummond, executed, in favour of the heirs of his body and other heirs *ſeriatim*, an entail of his eſtate, comprehending all his lands, except a ſmall parcel called *Norrieſton*, which was not mentioned in that deed. At the ſame time, he likewiſe executed a diſpoſition in favour of certain truſtees, of his whole eſtate, as contained in the entail; and " *of all other eſtate* " *whatſoever, real or perſonal, or of whatever denomination*, which " ſhould belong to him at the time of his deceaſe; and that for the " purpoſe of paying and clearing off the debts affecting the eſtate;" which, when this was done, they were to reconvey to the heirs of entail; but the truſt-deed was declared to be, in the mean time, revocable.

He afterwards acquired certain other lands; and having married, obliged himſelf, in his marriage-contract, to reſign the entailed eſtate in favour of the heirs of the marriage, and the other heirs ſpecified in the entail. Of this marriage, he had a ſon James; who, dying an infant, ſurvived him only a few months.

One of his ſiſters, Mrs Agatha Drummond, ſucceeded as heireſs of entail; when Mrs Mary, another of them, inſtituted an action againſt her, claiming as coheireſs of line, her proportion of the lands not comprehended in the entail, and likewiſe, as an executrix of James, her ſhare of his moveable effects; in ſupport of which, ſhe

Pleaded: The lands of Norrieſton having belonged to Mr Drummond at the time when he executed the deeds of entail and of truſt, their not being mentioned in either, is to be conſidered as owing to an intentional omiſſion; and therefore theſe lands, together with thoſe other which he acquired after that period, are ſtill unentailed ſubjects. Neither could come under the general denomination of " all " real

" real and perſonal eſtate," theſe not being adequate terms for the conveyance of lands by the law of Scotland.

With reſpect to the executry of James, this comprehends the rents of the entailed ſubjects which became due during his life: For though they did fall under the truſt-deed, that ſettlement, in virtue of the reſerved power, muſt be conſidered as ſo far revoked by the obligation in the contract of marriage relative to heirs.

Anſwered for the defender: The general deſcription, " all other " eſtate whatſoever, real or perſonal," is of itſelf ſufficient to comprehend all the lands belonging to the granter; but more eſpecially when his intention of including them all is ſo apparent. By the law of England, the terms *real eſtate*, in their ſtrict technical ſignification, denote " lands and tenements." The writer of this deed ſeems to have borrowed the phraſe thence; and, indeed, often with us the terms *real and perſonal* are uſed indiſcriminately for thoſe of *heritable and moveable*, which are the more proper technical expreſſions in Scotland.

The purſuer's claim to the rents of the entailed ſubjects during James's life, is not better founded. The truſt-right was for his benefit as heir of entail, and ſhould not be conſidered as revoked by the contract of marriage.

The opinion of the Court was, That the entailer's intention to ſettle the whole of his eſtate was ſufficiently evident; and likewiſe, that the above mentioned expreſſions might comprehend both the lands omitted in the deeds, and alſo thoſe acquired afterwards.

Some of the Judges, however, doubted, whether theſe general words were ſufficient for a conveyance of land property to be completed by infeftment. With reſpect to the lands of Norrieſton, they farther obſerved, that as the entailer ſeemed to have been ignorant of their being omitted in the entail, ſo it was impoſſible that, in the ſubſequent truſt-deed, he could ſupply that deficiency; and therefore, though his deſign was to contain in thoſe deeds all his lands, ſtill *quod voluit non fecit*.

With regard to the rents of the entailed lands due during the apparency of James, the Court conſidered, that theſe, though otherwiſe veſting in him, fell under the deed of truſt, which being calculated for his benefit, was not to be preſumed to have been revoked by the contract of marriage.

The Lords aſſoilzied the defender.

Lord *Stonefield*, Reporter. Act. *Wight*. Alt. *Ilay Campbell*. Clerk, *Orme*.

S.

N° LIV. *July* 17. 1782.

HERITORS of the Pariſh of COLLESSIE,

AGAINST

Miſs HENRIETTA SCOTT.

TEINDS. *Whether ſeparate* Reddendos *for ſtock and tithe be inconſiſtent with* decimæ incluſæ.

MISS SCOTT was proprietreſs of certain lands which had anciently belonged to the abbacy of Lindores. In all the different charters of theſe lands, the teinds were comprehended, and uniformly denominated, *decimæ garbales incluſæ*. Different duties, however, for ſtock and teind were contained in thoſe charters, and paid by the vaſſals.

In a proceſs of augmentation, Miſs Scott claimed an immunity from payment of ſtipend for theſe lands, as being held by her *cum decimis incluſis*.

But the court, conſidering that lands granted *cum decimis incluſis* were ſuch as had never been ſubject to the exaction of teind or in which there had never exiſted a ſeparation of ſtock and tithe, whereas here were an actual ſeparation and a correſponding diſtinct payment of duties, adhered to the Lord Ordinary's interlocutor repelling the objection.

Lord *Gardenſton*, Ordinary. Act. *Tytler*. Alt. *Ilay Campbell*, *R. Dundas*.

S.

N° LV. *July* 18. 1782.

Mrs AGATHA DRUMMOND,

AGAINST

JAMES SWANSTON.

RECOMPENCE. *Whether a landlord is entitled to claim from his tenant a ſhare of the expence of a diviſion of commonty proportioned to the tenant's intereſt.*

IN the diviſion of an extenſive commonty, carried on under the act 1695, cap. 38. an allotment having been made proportioned to a farm belonging to Mrs Drummond, and poſſeſſed by Swanſton as her

her tenant, the proprietreſs claimed from the tenant ſuch a ſhare of the expence as correſponded to his intereſt in this diviſion, which ſhe ſuppoſed to be the annualrent of the money diſburſed; and, in an action brought on that ground, ſhe

Pleaded: The ſtatute proceeds on the preſumption, that the diviſion of common poſſeſſion is a meaſure advantageous for all perſons concerned, with regard to whoſe rights and intereſts in the matter it empowers the Court to determine; and among theſe undoubtedly tenants are comprehended, whoſe intereſt may be of the duration of centuries. Though therefore the ſtatute is ſilent as to the defraying of the expence, either by the owner or the tenant; yet, that this expence ſhould be apportioned between them, according to their reſpective intereſts in the acquiſition, and in particular to the endurance of the tenant's poſſeſſion, is both juſt and equitable in itſelf, and agreeable to precedent in analogous caſes. Such are, the relief given to heritors out of whoſe temporal lands a glebe has, by the authority of the act 1663, cap. 1. been deſigned; the expences laid out by fiars or liferenters in the reparation of houſes, the former of whom are entitled to the intermediate intereſt during the poſſeſſion of the latter; 5th March 1755, Scott *contra* Forbes; and the executors of the latter to the principal ſum expended; Stair, 24th January 1672, Halket; or thoſe incurred by joint proprietors of a mill in obtaining a declarator of thirlage; Stair, 6th January 1676, Forbes; Dictionary *voce* Recompence.

Anſwered for the tenant: It is an obvious fallacy, to ſuppoſe that the diviſion of commonties is at all calculated for the benefit of the tenants. The ſtatute enacts, "*that any having intereſt* may raiſe ſummons for this purpoſe againſt *all perſons concerned.*" Now, was ever ſuch an action brought either by or againſt a tenant? But ſuppoſing the tenant to derive benefit from this meaſure, it would not follow, becauſe he had reaped ſome conſequential advantage, that, with reſpect to him, the expence neceſſary for accompliſhing it had been laid out *in re communi;* the principle on which the deciſions proceeded quoted by the purſuer. Indeed, the obligations on landlord and tenant are bounded by the contract of location, which muſt exclude all extrinſical and adventitious claims between them; Fountainhall, 20th December 1707, White's Tenants *contra* Houſton, Gilmour; February 1664, Hodge againſt Brown.

The Lords conſidered the claim againſt the tenant as having no foundation in the act of Parliament, and as little at common law; ſuch an eventual benefit as his being too indirect to authoriſe the demand of a recompence.

They therefore adhered to the Lord Ordinary's interlocutor, aſſoilzieing the defender.

Lord Ordinary, *Braxfield.* Act. *Ilay Campbell, Hume.* Alt. *Henry Erſkine.* Clerk, *Home.*

S.

N° LVI.

N° LVI. *July* 18. 1782.

HODGSON and DONALDSON,

AGAINST

BUSHBY.

BILL OF EXCHANGE. *Whether failure to intimate the diſhonour of a bill to an indorſer, ariſing from the holder's ignorance of the indorſer's place of reſidence, liberates the indorſer.*

MR BUSHBY of Ardwell, in Scotland, when in London, adhibited his name as indorſer to a bill accepted by Benjamin Graham, delivered to Hodgſon and Donaldſon, and payable in London, two months after date. This bill, when it became due, was regularly proteſted againſt the acceptor for not payment; but the indorſer having left London, and the holders being unacquainted with his place of reſidence in Scotland, no intimation of the diſhonour was ſent to him for twenty-one days thereafter.

In a proceſs, at the ſuit of the holder, for recourſe againſt the indorſer, who objected the want of due notification, the Lord Ordinary repelled the defence, " in reſpect it was admitted, that the " defender left London, the then place of his reſidence, before the " bill became due, and left no notice where he might be found, or " wrote to."

The defender reclaimed, and

Pleaded: That the obligations upon drawers and indorſers of bills of exchange may be attended with the leaſt poſſible inconveniency or hazard to them, and terminated within a period ſuited to the ſecurity they are intended to create, univerſal practice has impoſe a neceſſity upon the holders to notify the diſhonour within a limited time, under the penalty of forfeiting their recourſe againſt thoſe to whom ſuch intimation is not given. Hence a poſſeſſor of bills muſt inform himſelf of the place at which intimation of the diſhonour may be given to thoſe againſt whom he means to come for his payment; and if, by neglecting this precaution, timely notification is not ſent, he alone muſt ſuffer thereby. In this caſe, the holders, upon enquiry, would have been informed, that the defender was only occaſionally in London, and reſided ordinarily on his eſtate of Ardwell in Scotland, at which place they might have acquainted him, within the uſual time, of the bill's not having been paid.

The Lord Ordinary's interlocutor has taken for granted, that a perſon having ſet his name to a bill, at any place, muſt, upon leaving it, give notice to the holders where he may be found or wrote to. But in what manner can that be done? A bill may paſs through a thouſand hands, or it may be tranſmitted to a foreign country. How is it poſſible for the drawers or indorſers, in ſuch inſtances, to comply with this regulation? It is accordingly unknown in practice, and

and if introduced by a precedent in this caſe, would be attended with the moſt pernicious conſequences to trade. A queſtion of a ſimilar nature was lately decided by the Court. One Bell indorſed a bill to Grant, who indorſed it to a banking company at Glaſgow. The bill having been diſhonoured, and the diſhonour intimated to Grant, the laſt indorſer, who proved unable to pay, an action of recourſe was brought againſt Bell, the prior indorſer, to whom no intimation had been given. In ſupport of this action, the holders urged the impoſſibility of their knowing all the prior indorſers of a bill, and that it was therefore ſufficient to intimate to the laſt indorſer, whoſe duty it was, to acquaint his author with the diſhonour. But in anſwer to this, it was ſucceſsfully maintained, that the holder of a bill accepted of it upon the credit of the indorſers he knew, not of thoſe of whom he was ignorant; that if he knew them, it was his buſineſs to have acquainted them with the acceptor's not having retired the bill; and if he knew them not, there was no hardſhip in denying him recourſe againſt them; Elliot *contra* Bell, 14th February 1781.

Anſwered for the purſuers: The neceſſity of intimating the diſhonour of bills is not diſputed. But in this, and in every other caſe, where a condition introduced in favour of any perſon, is diſappointed by his fraud or negligence, it is held in law to be fulfilled, and the obligation to which it is annexed is thereby purified. The bill in queſtion was accepted, indorſed, and payable in London. The indorſer, by leaving London before it was exigible, without acquainting the holders whither intimation of the diſhonour might be ſent, rendered the execution of that formality impracticable in the ordinary way. But the holders made immediate enquiry at the perſons at whoſe entreaty they advanced money for this bill, and according to the earlieſt intelligence of the defender's reſidence, they regiſtered the bill, and uſed a charge of horning againſt him upon it. In the caſe quoted, the court did not determine what circumſtances excuſed the holder of a bill from giving intimation within the uſual period, but found, that intimation to the laſt indorſer did not, *per ſe*, preſerve recourſe againſt the prior indorſers.

Upon adviſing this argument, the Lords ſeemed agreed to alter the Lord Ordinary's interlocutor, and to aſſoilzie the defender; but it having been ſeparately contended by the purſuers, that at the delivery of this bill, they had made ſpecial inquiry after the indorſer's place of reſidence, and had been enformed that it was in a particular ſtreet in London, where they had accordingly ſought for it when the bill became due, the Lords ordered a condeſcendence of facts to be given in, and allowed a proof.

Lord Ordinary, *Elliock*. Act. *Elphinſton*. Alt. *Ilay Campbell*. Clerk, *Orme*.

S.

N° LVII. *July* 19. 1782.

RAMAGE,

AGAINST

CHARTERIS.

PRESCRIPTION—*of Merchants accounts, if interrupted by furniſhings made by the defender.*

RAMAGE, a merchant in York, had been in the uſe of furniſhing ſundry articles of thread manufacture to Charteris, who carried on trade in Scotland. In 1780 he inſtituted an action for payment of a balance alleged to be due to him. In the account exhibited in this action, the laſt article furniſhed by him bore date in the year 1776; ſo that in this view the triennial preſcription introduced by the ſtatute 1579, had taken place. But the defender having furniſhed goods to him within the three years, he made theſe furniſhings a part of his account, by which means it appeared to be current till within a year of commencing the action.

The queſtion was, Whether the ſtatute operated in the preſent caſe?

Pleaded for the defenders: So long as a merchant continues to furniſh goods to his employer, his claim, by the equitable interpretation of courts of law, is preſerved from the effects of the ſtatute 1579; Erſkine, b. 3. tit. 7. § 17. It never can be imagined that in theſe circumſtances he will take legal meaſures to effectuate payment of what is due to him; and the expreſſion uſed by the legiſlature, excluding all intention of commencing the preſcription from the date of each article, has afforded an opportunity of reconciling the enactment with what ordinarily occurs in practice. But whenever the furniſhings ceaſe, matters aſſume a different appearance. Then it muſt be ſuppoſed, that either the merchant has declined to give farther credit, or that the buyer has transferred his employment to another; and that in both caſes the merchant will loſe no time in inſiſting for his payment, if any thing remain unpaid. Hence, the moment the furniſhings ceaſe, the currency of the account is at an end, and the ſtatutory preſumption of payment, aided by the common practice of merchants, operates with full effect. Furniſhings by the defender can in no way remove the ſtatutory preſumption. If they were made towards extinction of the debt due to the purſuer, it is an eſtabliſhed point, that partial payments do not interrupt, but rather confirm the ſhort preſcription. If, again, they were not made in that view, they have no relation to the purſuer's account; and therefore ought to have no influence in any queſtion concerning it.

It has been found, that a plea of compenſation, not having effect in Scotland, by the mere act of the law, does not interrupt preſcription; Lord Kames's Rem. Deciſ. July 1719, Carmichael. Hence, had the preſent defender brought an action againſt the purſuer, for payment

payment of the articles furniſhed, within the three years, the purſuer could not have defended himſelf by ſhewing, that at the period of advancing theſe articles, there was an account due to him, outſtanding and unpreſcribed, which would more than ſatisfy the demand; and the deciſion muſt be the ſame in the preſent inſtance, unleſs it can be ſuppoſed that the party pleading compenſation, by aſſuming the character of purſuer, can create ſuch a material alteration in the nature of his plea.

A deciſion favourable to the purſuer would go far toward a repeal of this beneficial ſtatute. A merchant's books, having the appearance of being regularly kept, are probative in his favour. In rearing up a debt long ago paid, he has nothing to do but to inſert within the years of preſcription a furniſhing made by the defender, which will ſanctify a demand for any article ever furniſhed to him.

Anſwered for the purſuer: The method of keeping accounts between retail merchants, who are in the practice of mutual furniſhings, is to make only one account for both, on the one ſide of which all the articles furniſhed by the one party are kept, and on the other thoſe furniſhed by the other. In this way matters can at any time be adjuſted between them, by ſumming up theſe two ſides; whereas keeping two ſeparate accounts, ſtating the reſpective furniſhings and payments made of the price, could tend to nothing but confuſion.

From this mode of dealing, it is underſtood among merchants, that an account is current ſo long as either party has operated on it, whether on the debit or credit ſide, and that the preſcription cannot apply till three years have elapſed without a furniſhing by either party. A contrary idea would be attended with the moſt unjuſt conſequences. Two merchants being in a courſe of mutual furniſhings, one of them is conſiderably indebted to the other, and remits at different times goods to the credit of his account. Matters go on in this manner for three years, without a furniſhing on the part of the creditor. After this period, according to the plea now maintained, the debtor may ſue for payment of the articles furniſhed, not only within the three years, but at any diſtance of time during which his account has continued current; when, on the other hand, the perſon who is truly the creditor, not having furniſhed any thing within the three years, can neither ſue for his payment, nor defend himſelf from the demands of the other party.

The Lords gave oppoſite judgments; but finally "found the pre-
"ſcription run, and aſſoilzied."

Lord Ordinary, *Weſthall.* Act. *Elphinſton.* Alt. *Geo. Wallace, Craig.*
Clerk, *Orme.*

C.

N° LVIII.

N° LVIII. *July* 24. 1782.

WILLIAM CHALMER of Eaſter Dalry, Deacon of the Incorporation of Surgeons,

AGAINST

The LORD PROVOST, MAGISTRATES, and TOWN-COUNCIL of the City of Edinburgh.

BURGH ROYAL.—*Set of Burgh.*

UPON 15th September 1781, Mr Chalmer was unanimouſly elected deacon of the ſurgeons, had the oath *de fideli* adminiſtered to him, and entered into poſſeſſion of the office. Upon the following Wedneſday, being 19th September, the deacons of the different incorporations were, agreeable to the ſet and uſage of the burgh, preſented to the town-council; and ſuch of them as were preſent, had the oaths of counſellors, and the oaths to government, adminiſtered to them. Mr Chalmer being indiſpoſed, was unable perſonally to attend; but an extract of his act of election was produced, and no objection made to it.

Upon Thurſday, 20th September, there came on in the convenery the election of a deacon-convener; and at this meeting there were preſent the *fourteen* deacons of crafts, the *two* trades-counſellors, and together with theſe, the deacon-convener of the preceding year, who, as ſuch, had undoubted right to a caſting voice in the event of an equality of votes.

The candidates for the office upon this occaſion were, William Fraſer, deacon of the hammermen, and the ſaid Mr Chalmer, who, in order to ſhew his right to be held a member of the convenery, produced the extract of his act of election as deacon of the ſurgeons, and a certificate of his having ſince that time taken the oaths to government before one of his Majeſty's juſtices of the peace for the county of Edinburgh.

On the part of Mr Fraſer it was objected, That as Mr Chalmer had not been preſented to and received by the town-council as deacon, ſo he had no legal right to be held a member of the convenery, and could not be upon the leet for the office of convener. Mr Chalmer, however, proceeded to act and vote, and, by including his own, the number of votes in his favour being equal to the votes for Mr Fraſer, the matter came to be determined by the caſting voice of the former deacon-convener, who gave it for Mr Chalmer.

Afterwards Mr Chalmer, upon appearing before the town-council, was received as deacon, and took the oaths in the uſual manner, under proteſt, however, that his doing ſo was not neceſſary in order to give him right to be a member of the convenery; and both he and Mr Fraſer having ſeverally claimed to be received and qualified by the

the council, as deacon-convener, each alleging that he had been elected by a legal majority of the convenery, the council gave their determination in favour of Mr Fraſer, who was accordingly received, and had the oaths adminiſtered to him in common form.

Mr Chalmer brought this determination under review, by bill of ſuſpenſion; which having been paſſed, the Lord Ordinary took the cauſe to report; and it was argued at great length in informations.

Upon *the part of Mr Fraſer*, it was contended, That the deacons form a part of the town-council, and are ſubject to its authority; that the council give out a ſhort leet of three, out of which the deacon of each incorporation is choſen; that the deacon, when elected, muſt be preſented to the council, and by them be authoriſed in his office; that by the *ſet of the burgh*, given by the decreet-arbitral of King James VI. in 1583, it is ſpecially provided, that "upon the next "counſel-day after the election of deakens, the auld deakens, with "ſome of the maiſters of their crafts, ſall preſent the new deakens to "the counſel, quha ſall authoriſe them in their offices;" that agreeable to this, a deacon till ſo authoriſed, is not entitled to act as ſuch, or to ſit and vote in the *convenery*; and that as in this caſe, Mr Chalmer was abſent when he ſhould have been preſented to the council, and authoriſed in his office, ſo in that ſituation he was not entitled to vote in the convenery, or to ſtand candidate for the office of convener.

To theſe arguments, it was anſwered, *on the part of Mr Chalmer*, That the office of deacon was originally altogether unconnected with the town-council; that although deacons came afterwards to form a part of the town-council, yet this did not vary their original and ſeparate capacity as heads of their ſeveral crafts; and that although it be requiſite to preſent the deacons in council, in order to their taking the oaths *as counſellors*, and to their being received and authoriſed in *that character*, yet no ſuch form was ever ſuppoſed neceſſary to entitle them to act as heads of their ſeveral crafts, and as members of the convenery. To make out this, a long hiſtorical deduction was given, which in ſubſtance was as follows.

The original inſtitution of deacons was merely for the purpoſe of regulating craftſmen in the exerciſe of their trade, and checking any abuſes they might commit to the prejudice of the public. For a very long time, the deacons of crafts formed no part of the town-council of burghs; the election of the magiſtrates and council, till the year 1469, being annually by a poll of the whole free burgeſſes, as may be ſeen from the *Leges Burgorum*, *c.* 77. and the *Statuta Gildæ*, *c.* 33. 34. and the deacons of crafts being entitled to nothing more than thier privilege, like every other burgeſs, of electing or of being elected into the office of magiſtrate or counſellor. The connection between *deacons* and the *town-council* of burghs took its riſe from the remarkable change introduced by the act 1469, *c.* 29. which made the form of election ariſtocratical, in place of democratical, and appointed that the old council ſhould chuſe the new council; and that the old and new council, together with the *deacons of crafts*, ſhall chuſe the magiſtrates. In this manner deacons came to have *ex officio*, a ſhare in the government of the burgh; and beſides being the head of his incorporation, entitled to preſide in their meetings, and to exerciſe his au-

thority over the members of his craft, a deacon had now conferred upon him the new and additional character of being a *conſtituent member* of the *town-council.*

From all this it was contended, That the office of a deacon, as chief officer of his incorporation, was quite diſtinct and ſeparate from his character as a member of the town-council; and that the additional capacity of *counſellor* made no variation upon the rights and privileges of the more ancient and ſeparate office of *deacon.* With regard to the ſet 1583, about *preſenting* and *authoriſing* deacons in council, it was obſerved, that it entirely related to the capacity of the deacon as *counſellor.* As he was to be a *counſellor* as well as *deacon*, it was proper his election ſhould be certified to the council, and that he ſhould be preſented, in order to his being received at the council-board; and by *authoriſing him in his office*, nothing more was meant, than the admitting and adminiſtering the oaths to him as counſellor. Before being preſented, he was already elected deacon, and the council had not any right to reject him, or to put a negative upon the choice made; all that they had to do being nothing farther than the mere miniſterial power of admitting him as counſellor, and adminiſtering to him the oaths taken by counſellors. With reſpect again to the convenery, it was ſhown to be a meeting compoſed of the deacons themſelves, not in their character as *counſellors*, but in their diſtinct original capacity, *as heads of their ſeveral crafts*; and therefore the being preſented and received in council was not requiſite, in order to entitle a deacon to be a member of the convenery.

The Court had no difficulty in finding the determination of the magiſtrates and town-council erroneous: They therefore "ſuſpend-" ed the letters *ſimpliciter*, and found expences due.

Lord *Kennet* Reporter. For Mr Calmer, *Cullen. Cha. Hay. Buchan-Hepburn, Blair.* Clerk, *Colquhoun.* For the Magiſtrates,

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N° LIX. *July* 26. 1782.

ELISABETH HENDERSON,

AGAINST

JAMES HENDERSON, and others.

PRESUMPTION.—*Whether a diſcharge, by children, of all ſettlements made on them by their father, be applicable to one latent and revocable.*

LEGITIM.—*Whether a claim, under a father's total ſettlement, be compatible with that of legitim.*

GEORGE HENDERSON, by his marriage-contract, made certain proviſions in favour of the children of the marriage. He afterwards, having acquired many additional funds and ſubjects, executed a total ſettlement of his effects on the children then exiſting, James, John,

John, Margaret, and Eliſabeth; but in that deed, which was not delivered, he reſerved a power of revocation.

Several years poſterior to its date, he conveyed to his three elder children a certain debt ſecured by heritable bond, "in conſideration of "their exonering and acquitting him not only of the proviſions conceived in their favour by his contract of marriage, but alſo of whatever "they could aſk or claim by or through his marriage with their mother, and communion thereby formed, or by and through the diſſolution of that communion by her death; and that whether conqueſt, legitim, or dead's part, natural, or bairn's portions, *or any "proviſion heretofore conceived in their or any of their favours.*" They accordingly granted to him a diſcharge and renunciation "of the "proviſions in the contract of marriage, and of any *other* proviſions, "ſubſtitutions, or deſtinations of ſucceſſion, *conceived in their favour*, "and of all claims ariſing from the diſſolution of the marriage, or the "death of their father, whether of dead's part, conqueſt, or legitim."

Upon George Henderſon's death, the total ſettlement in favour of his whole children was found unrevoked in his repoſitories.

Eliſabeth, however, his youngeſt child, having no ſhare in the conveyance of the heritable debt, and not having concurred in the diſcharge, laid claim to the whole of her father's ſucceſſion, challenging the office of executor excluſively of her brothers and ſiſter; and inſiſting in an action of declarator of her right. In a proceſs of advocation from the commiſſaries, conjoined with this declarator, ſhe

Pleaded: By their acceptance of the diſpoſition, and by their diſcharge and renunciation, the other children have abandoned every claim, not only ariſing from their father's and mother's contract of marriage, from the diſſolution of the marriage, or from the death of their father; but likewiſe from any "proviſion heretofore conceived, "and of any ſubſtitution or deſtination of ſucceſſion in their favour." Thus, then, they are excluded from the benefit of the ſettlement formerly made in their behalf, as well as in that of their youngeſt ſiſter, and conſequently ſhe is entitled alone to claim under that deed.

If, however, their renunciation were not underſtood to have the effect of precluding the claims of the other children under the deed of ſettlement, ſtill it would confeſſedly bar their pretenſions to any part of the legitim at leaſt, which therefore muſt wholly belong to her; Erſkine, b. 3. tit. 9. § 23. For though, by the laſt mentioned deed, a particular proviſion is conceived in her favour, yet this does not infringe her right to the legitim. A poſterior voluntary proviſion to a child is not interpreted to be in ſatisfaction of a prior one; Stair, b. 1. tit. 8. § 2. *in fine*. Much leſs is it to be conſtrued as coming in place of the child's legal claim to legitim; Dictionary, *voce* Preſumption. Nothing therefore leſs than an explicit declaration could have that effect. Nor is the claim barred by the generality of the ſettlement; as it is limited in expreſs terms to the moveable effects "belonging to him at his death;" which words can be properly underſtood only of the dead's part.

Anſwered: The elder children have indeed renounced every claim which at the time was competent to them againſt their father, as of legitim,

legitim, of proviſion under the marriage-contract, or of any other proviſion then effectual in their favour. But as their father's deed of ſettlement was undelivered and revocable, no claim could accrue to them from it until his death; and conſequently prior to that event, there exiſted not any right to be the ſubject of renunciation. Such a claim, it is true, has ſupervened on his death, but is long poſterior to the diſcharge and renunciation.

With reſpect to the legitim, it is to be obſerved, that the deed of ſettlement comprehended the whole effects of George Henderſon, heritable and moveable; as, notwithſtanding the criticiſm on the phraſe, "belonging to me at the time of my deceaſe," is plain from the terms of the deed, agreeably to the interpretation of the Court in a ſimilar caſe; Riddel *contra* Dalton, 28th November 1781. The ſubject of the legitim was therefore diſpoſed of as well as the dead's part. As Eliſabeth cannot both approbate and reprobate this deed, though ſhe may do either, ſo, if ſhe claim any benefit from it, ſhe muſt reſign her pretenſions to the legitim, which are thereby precluded; or if ſhe inſiſt on the latter, ſhe can no longer challenge an intereſt in the former, ſo much more valuable to her.

The Court were of opinion, That as the deed of ſettlement was not delivered, but remained in the granter's repoſitories at the date of the diſcharge and renunciation, this could not be underſtood to comprehend the effect of that deed. They further conſidered the ſettlement, being a total one, as incompatible with the claim of legitim, however conſiſtent with this claim, a particular proviſion might have been.

The Lords, therefore, "aſſoilzied John, James, and Margaret Hen-
"derſons from the claims of Eliſabeth."

Lord Ordinary, *Kennet.* For Eliſabeth Henderſon, *Maclaurin, Rolland.*
For the other Children, *Ilay Campbell, G. Ferguſſon.* Clerk, *Colquhoun.*

S.

N° LX. *Auguſt* 1. 1782.

JOHN KIRKMAN,

AGAINST

JOSEPH PYM.

MINOR. *Whether the Supreme Court ſhould authoriſe a debtor to pay his debt to a minor not having curators.*

PYM was indebted to Kirkman's father, an Alderman of London, in a large ſum of money, ſecured by an heritable bond upon ſome houſes in Edinburgh. On the death of Alderman Kirkman, the

the ſon ſucceeded to his heritable fortune; but no curators had been appointed to him, and he choſe none for himſelf. In the *ſeventeeth* year of his age, he demanded payment of this debt; when Pym objected, that as he was without curators, payment could not then be made to him with ſafety; but, at the ſame time, declared his willingneſs to pay the debt, upon being ſecured by a judgment of the Court, *cauſa cognita*, againſt the hazard of being obliged to make payment a ſecond time.

Obſerved on the Bench: This queſtion, which relates to the payment of a principal ſum, or *ſors*, is to be diſtinguiſhed from all caſes in which the intereſt only of money, or the rents of ſubjects, are claimed; thoſe ordinary acts of adminiſtration which might be neceſſary for a minor's ſupport. Accordingly,

The Lords were of opinion, That as the debtor could not, even by making full payment, be ſecure againſt future challenge, unleſs the money were to be afterwards profitably employed for the minor's behoof, ſo the Court ought not to interpoſe their authority, in order to compel him to do an act which would ſubject him to that hazard.

But as the minor at laſt made an offer of ſufficient ſecurity for the debtor's indemnification, the interlocutor of the Court was as follows:—

" The Lords find, That, in this caſe, the Court ought not to interpoſe to oblige the ſuſpender to pay the debt charged on upon the diſcharge and renunciation offered; and remit to the Lord Elliock, Ordinary, to proceed in the cauſe, and to hear parties procurators upon any further ſecurity that may be offered by the charger for the indemnification of the ſuſpender."

Lord *Elliock*, Reporter. Act. *Cullen*. Alt. *H. Erſkine*. Clerk, *Home*.

S.

N° LXI. *Auguſt* 3. 1782.

BUCHANNANS,

AGAINST

GRAY and HALL.

SEQUESTRATION—*refuſed, where real creditors are in poſſeſſion, though their debts are under challenge.*

CERTAIN heritable ſubjects, which belonged to the deceaſed Robert Hall, had been poſſeſſed by Mr Farquhar-Gray, and Miſs Hall, by virtue of heritable ſecurities granted by the proprietor.

Alexander and Jean Buchannans, adjudging creditors of the ſaid Robert Hall, inſtituted a proceſs of ranking and ſale of his creditors and eſtate, and alſo a proceſs of count and reckoning againſt the heritable creditors. In theſe actions, ſundry objections were ſtated to the validity of the grounds of debt founded on by the heritable creditors. It was likewiſe maintained, that the debts, ſuppoſing them unexceptionable, had been extinguiſhed by the creditors intromiſſion with the rents.

Matters being in this ſituation, they applied for a ſequeſtration of the lands under ſale. It was oppoſed by the heritable creditors, who

Pleaded: Whatever may be the reſult of the objections moved by the adjudging creditors to the debts upon which poſſeſſion has been attained, it is evident, that theſe objections cannot be determined in the courſe of a ſummary application for ſequeſtrating the lands; and that the debts at this period muſt be held as legal and ſubſiſting. The preſent application is therefore improper in many reſpects. It would be unjuſt to deprive heritable creditors of the poſſeſſion, which they hold by the deed of the proprietor and for the ſatisfaction of juſt debts. Such ſtep is alſo unneceſſary; becauſe the heritable creditors, by entering into poſſeſſion, have become anſwerable to all concerned for the proper management of the ſubjects. And it is moreover repugnant to practice, that ſequeſtrators ſhould be appointed to diſpoſſeſs or diſturb creditors who are in actual poſſeſſion, and ready inſtantly to debate their rights; Law Dictionary, *voce* Sequeſtration.

"The Lords refuſed to ſequeſtrate."

For Buchannans, *Arch. Campbell.* For Gray and Hall, *Geo. Ferguſſon.*

C.

N° LXII. *Auguſt* 5. 1782.

BLAIRS,

AGAINST

BELL, and others.

CLAUSE—*in a liferent by reſervation, reſtricting the liferent during the exiſtence of children.*

JEAN SCOTT, proprietrix of the lands of Beltenmont, in her contract of marriage with Bryce Blair, in conſideration of the proviſions ſtipulated to her, and her children, diſponed theſe lands, "to "and in favour of herſelf, and the ſaid Bryce Blair, in conjunct fee "and liferent, and to the heirs to be lawfully procreated of the ſaid "marriage

" marriage between them, in fee; which failing, to the heirs lawfully " to be procreated of the ſaid Jean Scott's body in any other mar- " riage; which alſo failing, to the ſaid Bryce Blair, his heirs and " aſſignees whatſoever: But declaring, that in caſe there be children, " one or more, male or female, procreate of the ſaid marriage, and " exiſting at the death of the ſaid Bryce Blair, and that the ſaid Jean " Scott ſurvive him, then, and in that caſe, ſhe hereby, during the " exiſtence of the ſaid child or children, reſtricts and limits her life- " rent to an annuity of L. 30 Sterling yearly, upliftable forth of the " ſaid lands; the remainder of the rents, and profits thereof, being " to go to the child or children to be procreate of the ſaid marriage."

Bryce Blair died in bankrupt circumſtances, leaving a widow and ſix children of the marriage; upon which event, ſeveral queſtions aroſe reſpecting the conſtruction of the clauſes above recited.

The *firſt* was, Who was liar in theſe lands, which the Lords decided in favour of the huſband's creditors, 11th Auguſt 1781.

The *next* was the import of the clauſe reſtricting the widow's liferent, in caſe of children, to an annuity of L. 30 Sterling, Whether theſe children were to take the reſidue as aſſignees from the mother, or as heirs of proviſion to their father, in which caſe it would be affected by his onerous contractions.

Pleaded for the creditors: It is now a fixed point, that theſe lands were made over to the huſband in abſolute property. By the ordinary rules of law, therefore, whatever burden is taken off them muſt accrue to the huſband, and make a part of his eſtate. Hence, after ſatisfying the widow's annuity, the rents of this eſtate muſt, on the event of children, belong to the huſband, and can only be taken by the child or children as heirs of proviſion to him.

The preſent caſe in no manner differs from that which daily occurs, when a certain ſhare of the moveables is provided to the wife, if there be children, and a larger ſhare if there be none. The object of ſuch clauſe, without doubt, is, that a larger fund may remain for ſupporting the children; but it can, upon no principle of law hitherto known, be converted into a proviſion in their favour unaffectable by their father's debts. Had ſuch been intended, a clauſe of a very different nature would have occurred, obliging the widow to beſtow the reſidue, after L. 30 Sterling, among her children; and their right would have been made to depend, not upon her life, but upon their own, or to ſubſiſt till their marriage or majority.

Anſwered for the children: Although the fee of theſe lands, by the conception of the marriage contract, veſted in the huſband, yet the liferent-right, antecedently in the wife, is by the ſame deed, and at the ſame inſtant, reſerved to her, unattachable for the huſband's debts; and had no children exiſted, or if the children ſhould predeceaſe their mother, this total liferent would remain in its full force. The reſtriction, therefore, ſtipulated in the event of children, was purely intended in their behalf, not of the huſband, his heir, or their creditors, who, during the life of the widow, can, in no poſſible event, have the ſmalleſt intereſt therein; and every doubt on this head is removed, by a clauſe directing, in the moſt explicit terms, that the " remainder ſhall go to the child or children of the marriage." Hence this proviſion will be enjoyed by them, not in the character of heirs

heirs to their father, of whoſe fortune it at no time conſtituted a part, but by virtue of the expreſs conveyance and allocation contained in the marriage contract. It might have been ſtipulated in the ſame words to a diſtant relation or ſtranger, in which caſe it is clear that no ſervice would be neceſſary for making up right to it. Where a perſon in his marriage contract gives his wife a larger ſhare of his moveables or eſtate in the event of no children, and a ſmaller if children exiſt, no right can from thence ariſe to the children. The ſubjects excepted, originally belonging to the huſband, and nowiſe deſtined to the children by any particular ſettlement, muſt continue in their former ſituation. But ſuch caſe is widely different from the preſent; and no argument can, with propriety, be drawn from the one to the other.

The Lords gave contrary judgments; but at laſt found, "That "the children of the marriage between the deceaſed Bryce "Blair and Jean Scott, have right, during the life of their mo- "ther, to the excreſcence of rents, after paying to her the life- "rent annuity of L. 30 Sterling, and that the ſame are not affect- "able by the creditors of the father."

Lord Ordinary, *Kennet.* For the Creditors, *Ilay Campbell, Elphinſton.*
For the Children, *Rae, Wight.* Clerk, *Home.*

C.

N° LXIII. *Auguſt* 7. 1782.

JOHN NAPIER, and others,

AGAINST

WALTER ROBISON, and others.

JURISDICTION. *Whether the Juſtices of the Peace have the power of ſhutting up one of two public roads, when that which is left is the moſt convenient, and ſufficient to anſwer the purpoſes of both.*

NAPIER inſtituted a proceſs of reduction of a decree of the Juſtices of the Peace of Stirlingſhire, by which they had ordained a road to be ſhut up, which led, by a place called *Mildavie*, thro' the grounds of Mr Robiſon and the other defenders, to the highway between Glaſgow and the country weſtward of Strathblane; whilſt another road deemed more convenient, paſſed by Edinkiln-bridge to the ſame great road.

It appeared, that the firſt mentioned road, as well as the other, had been immemorially poſſeſſed by the public; and therefore the Court, as in the caſe of Turner *contra* Duke of Roxburgh, 14th June 1749, Kilker.; and more lately in that of Spottiſwoode of Dunnipace, were of opinion, That whether the road in queſtion was more or leſs convenient than the other one, the Juſtices of the Peace had, by ſhutting

ting it up, equally exceeded their powers, which they derive only from the ſtatutes 1661, cap. 41. and 1669, cap. 16.; for that the public were entitled to both roads.

They therefore ſuſtained the reaſons of reduction.

Lord Ordinary, *Ankerville*, Clerk, *Menzies*. Act. *Geo. Ferguſſon*. Alt. *Ilay Campbell*.

S.

N° LXIV. *Auguſt* 9. 1782.

GEORGE NORVALL,

AGAINST

JOHN BLAIR.

ADJUDICATION. *Whether, on a ſpecial adjudication, the clearing of incumbrances ought to precede the producing a progreſs.*

IN a proceſs of adjudication at Norvall's inſtance againſt Blair, the latter offered to comply with the firſt alternative required in the act 1672, cap. 19.; by having ſuch a part of his lands adjudged as was ſufficient for payment of the debt, principal and intereſt, with a fifth part more, and probation taken concerning the yearly rent and value of the ſubjects; by making production of a complete progreſs of the rights and titles of the lands; and then by purging the real incumbrances affecting them. Accordingly he produced a progreſs; but

Norvall *objected:* That unleſs the incumbrances had been already cleared, it was not ſufficient to have done ſo; otherwiſe, after much time and expence had been waſted in the inveſtigation of the titles, it might, and indeed certainly would, happen, that the incumbrances could not be removed; and that thus every creditor muſt be ſubjected to great procraſtination, hardſhip, and loſs, at the pleaſure of his debtor; abuſes to which it is not to be preſumed that the act of parliament would give a ſanction.

Anſwered: The defender has ſtrictly adhered to the ſtatutory mode of proceeding, in the order of which, as above ſtated, the clearing of incumbrances is the laſt requiſite.

"The Lords remitted the cauſe to the Lord Ordinary, with power "to his Lordſhip, to ordain the defender to condeſcend upon what "part of the lands libelled ſhall be ſpecially adjudged to the purſuer; "to allow a proof of the yearly worth and value of the ſaid lands "ſo to be ſpecially adjudged; and to proceed further in the cauſe, "and to do as he ſhould ſee juſt."

Lord *Hailes*, Reporter. Act. *Anſtruther*. Alt. *Hay*. Clerk, *Menzies*.

DECISIONS

OF THE

COURT OF SESSION.

N° LXV. *November* 15. 1782.

ALEXANDER-JAMES GRANT, and his TUTOR,

AGAINST

The CREDITORS of SKELBO.

PROCESS. *The reclaiming days do not run againſt a pupil whoſe tutor is dead.*

IN the ranking of the creditors of Skelbo, Alexander-James Grant, then an infant, and his tutor, preſented a claim, which was rejected by the Lord Ordinary; and before the days appointed for repreſenting had elapſed, the tutor died.

More than two years afterwards, Mr Grant and a new tutor having for the firſt time offered a repreſentation, the Lord Ordinary found, " That he was barred from inſiſting in his preſent claim, by " a final interlocutor."

Upon adviſing a *reclaiming* petition for Mr Grant, with anſwers for the creditors,

The Lords found, " That there was no *res judicata*; and remitted " to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Kames.* For Mr Grant, *James Grant.* For the Creditors, *Geo. Ferguſſon.*
Clerk, *Hume.*

C.

N° LXVI. *November* 19. 1782.

SAMUEL BROWN,

AGAINST

PETER BLACKBURN.

PASSIVE TITLE,—*How far a reſiduary legatee, accepting a ſum of money for a conveyance of his right, is liable to that extent for the teſtator's moveable debts.*

BY the death of Dr Brown of Jamaica, his perſonal eſtate in that iſland, after payment of his debts and certain legacies, devolved to Mr Blackburn, in the character of reſiduary legatee, his real eſtate there, to Patrick Brown, as his heir at law; and a debt due to him, which was ſecured by infeftment in Scotland, to Samuel Brown, as his heir of conqueſt.

A tranſaction took place between Mr Blackburn, the reſiduary legatee, and Patrick Brown, the heir in Jamaica; by which, for the ſum of L. 1000 Sterling, the former ſold to the latter his intereſt in the perſonal eſtate.

It however ſoon appeared, that the ſubjects falling under this tranſaction were inadequate to the payment of the Doctor's debts; and a perſonal creditor of his having attached in Scotland Samuel Brown's ſhare of the ſucceſſion, the latter, for his relief, purſued Mr Blackburn, as having intromitted with the effects primarily liable for debts of that ſort. In ſupport of this action, the purſuer

Pleaded: By the acceptance of a conſiderable ſum as a *ſurrogatum* in place of the whole free executry, the defender muſt be underſtood to have intromitted to that extent with the moveable eſtate of the defunct; otherwiſe, it would be in the power of executors, or reſiduary legatees, by agreements of this kind, in defraud of creditors, to ſecure the whole funds to themſelves.

Anſwered: Had the reſiduary legatee, by the interpoſition of a third party, intromitted with the moveable funds of the deceaſed, his ſituation muſt in all reſpects have been the ſame as if he had taken effects to the ſame extent directly under the will. But here there were no effects to be the ſubject of intromiſſion. The bargain therefore concerning the eventual profits ariſing from the bequeſt in favour of the defender, not having in the leaſt diminiſhed thoſe funds out of which the purſuer could hope for relief, it affords no foundation

tion for the preſent claim. Dictionary, vol. 2. *voce* Paſſive Title; July 5. 1666, Scots.

The Lords ſuſtained the defences.

Lord Reporter, *Hailes.* Act. *Rae.* Alt. *Armſtrong, Ilay Campbell, Croſbie.*
Clerk, *Home.*

C.

N° LXVII. *November* 19. 1782.

SAMUEL BROWN,

AGAINST

PATRICK BROWN.

HEIR AND EXECUTOR.—*Heir-general liable to relieve heirs of a particular denomination.*

THE purſuer having failed in obtaining relief from Mr Blackburn, as intromitter with the perſonal eſtate, inſiſted againſt Mr Patrick Brown, as heir-general to the deceaſed, and conſequently liable to relieve the heir of conqueſt from all obligations not immediately affecting the ſubjects falling under the ſucceſſion of the latter.

Pleaded in defence: The grandfather of the deceaſed left four ſons. The defender repreſents the eldeſt; the purſuer the ſecond; the defunct was the ſon of the third; and there was likewiſe a fourth ſon, who had iſſue. As by the law of Scotland the heritage or general repreſentation of the deceaſed brother or uncle deſcends to the next younger brother or uncle; the repreſentative of the fourth ſon, and not the defender, who is the deſcendant of the eldeſt brother, is heir of line to the deceaſed. In England again, the law of which regulates the ſucceſſion in the iſland of Jamaica, as the real eſtate of every denomination goes to the eldeſt brother, the defender, in place of being obliged to relieve any other heir, would be entitled himſelf to the ſucceſſion.

Hence, as matters ſtood at the predeceſſor's death, the period when rights of ſucceſſion are finally aſcertained, the preſent claim was altogether incompetent; nor ought the extraneous circumſtance, of the defender's having a reſidence in Scotland, to ſubject him to that right of relief, which the peculiarity of the law of this country indulges to heirs of conqueſt.

Anſwered: In whomſoever the general repreſentation of the deceaſed

ſed is veſted, that perſon muſt be liable primarily to all his debts. Heirs of a particular denomination, ſuch as conqueſt, proviſion, marriage, or heirs-male, who ſucceed to the ſubjects ſpecially deviſed to them, either by proviſion of law, or the deſtination of the proprietor, are conſidered, with regard to him, as ſingular ſucceſſors, and their ſeveral intereſts admit no defalcation, while he who is held to be *eadem perſona cum defuncto* is poſſeſſed of effects ſufficient for their relief.

Nor is it of importance in the preſent queſtion, that by the law of England, the defender is entitled to the whole real eſtate; nor that, by the law of Scotland, the deſcendants of a younger brother would have excluded him from the ſucceſſion. As of all thoſe who enjoy any part of the predeceſſor's eſtate, he alone is entitled to the character of heir-general, every burden which is not of its nature applicable to the eſtate falling to the particular heirs, muſt affect him only.

The Lords repelled the defences.

Lord Reporter, *Hailes.* Act. *Rae.* Alt. *David Armſtrong.* Clerk, *Hume.*

C.

N° LXVIII. *November* 19. 1782.

JANET GLENDINNING,

AGAINST

JAMES FLINT.

ALIMENT—*of a baſtard child.—How long the mother is entitled to the cuſtody of the child, and to payment from the father for its maintenance.*

JANET GLENDINNING ſued Flint for *aliment* of a baſtard *female* child whom ſhe had born to him.

In determining the *quantum* of that allowance, the Court was influenced by a ſpecific obligation under the hand of Flint. With regard to the endurance of it, or of the mother's right to the cuſtody of her child, their Lordſhips ſeemed to be chiefly moved by the conſideration of the child's being of the female ſex.

The Lord Ordinary had found, "That the purſuer, Janet Glen-
"dinning, was entitled to keep the child until it attain the age of
"ſeven years, and to be paid an aliment therefor, at the rate of
"L. 100 Scots yearly." But,

The

The Court varied that interlocutor, and " found the purſuer enti-
" tled to aliment for her child, at the rate of L. 10 Sterling *per*
" *annum*, ay and until ſhe arrives at the age of *ten* years com-
" plete; reſerving to the child to apply afterwards for aliment,
" as accords."

Lord Ordinary, *Weſthall.* Act. *Little.* Alt. *Henry Erſkine.*
Clerk. *Colquhoun.*

S.

N° LXIX. *November* 20. 1782.

ROBERT JOHNSTON,

AGAINST

The Honourable WILLIAM-MORDAUNT MAITLAND, and the Earl of LAUDERDALE, his adminiſtrator-in-law.

MINOR,—*who follows a profeſſion.*

MR MAITLAND, in the fifteenth year of his age, received a commiſſion in the army; and having, in the courſe of a few months after, run in debt to Mr Johnſton, toyman in Edinburgh, he granted his acceptance for the amount, being L. 17, 17 s. A few days after he incurred a farther debt of L. 7, 18 s. Of the furniſhings compoſing this debt, ſome might have been deemed altogether uſeleſs and frivolous; but the greater part were articles which, although not abſolutely neceſſary, are commonly poſſeſſed by young gentlemen of faſhion and fortune.

Payment having been refuſed, Mr Johnſton commenced an action before the ſheriff of the county, and attached Mr Maitland's horſes in ſecurity. The ſheriff " ordained the articles which were ſtill in the " defender's poſſeſſion, to be delivered up, and aſſoilzied *quoad ultra*;" and Mr Johnſton having brought this judgment under review of the Court of Seſſion by a bill of advocation,

Pleaded: By following a profeſſion, and enjoying an income independently of his father, the defender's ſituation is different from that of a minor living in the houſe, and under the immediate direction of his curators, either legal or dative. Hence, furniſhings made to him *bona fide*, for no more than an adequate price, like money lent on bond or bill to a minor who is a writer or merchant, ought to be ſuſtained as the foundation of diligence for attaching his proper eſtate, Dict. of Deciſ. *voce* Minor. To require a ſpecial mandate in

 tranſactions

tranſactions of this ſort, would be attended with much unneceſſary embarraſſment to the minor, and thoſe intereſted in his welfare.

Farther, As a merchant may lawfully ſupply a minor with clothes, and other neceſſaries, Dict. of Deciſ. *voce* Minor, the privilege of reſtitution is inapplicable to the preſent caſe. Under the appellation of *neceſſaries* are not included food and clothing alone; furniſhings, even for the purpoſes of luxury and ſhow, when becoming, or uſually poſſeſſed by perſons of like rank and fortune, are to be put in the ſame claſs. And the bulk of thoſe now under conſideration being of that deſcription, the few remaining articles will fall under the maxim, *De minimis non curat prætor.*

Laſtly, As moſt of the articles were ſuch as could not be deſtroyed in the uſing, the ſheriff's interlocutor, inſtead of limiting the reſtitution to thoſe ſtill in the defender's poſſeſſion, ought to have obliged him to declare where they were; the purſuer, from the nature of reſtitution, being entitled to recover the poſſeſſion of them where-ever they are to be found.

Anſwered: The general rule in this matter is undoubted, that every contract entered into by a minor without the conſent of his curators, and which is not conducive to his real advantage, is *ipſo jure* void and null. Nor does the preſent caſe afford an exception from this ſalutary regulation. Although effect be given to the obligations of minors relative to the trade or profeſſion in which they are employed, becauſe a contrary practice, by excluding them from all commerce and credit, would tend to their irreparable prejudice, it ſurely will not follow, that contractions nowiſe connected with their employment ſhould be intitled to the ſame indulgence.

By *neceſſary* furniſhings, in the other exception from the general rule, are meant thoſe which are of *indiſpenſable* uſe in the minor's ſubſiſtence and education. Some of theſe now under conſideration, without great impropriety, might have been made to the minor for money inſtantly advanced. Others are of a ſpecies ſo uncommonly uſeleſs and extravagant, as to exclude every pretence of *bona fides.* The circumſtance, too, of the purſuer's taking a bill of exchange for the debt, by ſhewing in the cleareſt manner his conviction that the young gentleman's expences were not ſupplied by his guardians, and could not be afforded out of his pay as an officer, muſt place this claim in a moſt unfavourable point of view.

One of the *judges*, conſidering the practice of merchants taking bills from minors as highly improper and inexpedient, was for diſmiſſing the action; another was for making a diſtinction between the furniſhings which were altogether extravagant, and the reſt; and all agreed, that contractions of this ſort were incapable of producing action againſt a father upon his natural obligation to afford an aliment to his children. The majority, however, were of opinion, That in an action againſt the minor himſelf, and to the effect of attaching his proper eſtate, the circumſtance of his enjoying a commiſſion in the

the army was ſufficient to juſtify advances ſuch as the preſent, which were in general unexceptionable.

The Lords therefore advocated the cauſe, repelled the defences, and decerned.

Lord Reporter, *Gardenſton.* Act. *Henry Erſkine.* Alt. *Geo. Fergusſon.*
Orme, Clerk.

C.

N° LXX. *November* 25. 1782.

KATHARINE WALLACE, and others,

AGAINST

WILLIAM WALLACE.

WRIT. *A miſſive letter, not holograph, containing an obligation of relief, is not a ground of action, though the ſubſcription be judicially acknowledged.*

WILLIAM WALLACE ſubſcribed an obligatory miſſive letter, not holograph of himſelf, by which "he became bound to relieve "Katharine Wallace of a cautionary engagement" incurred by her father for a third party. She having brought an action againſt him on that ground, he judicially acknowledged his ſubſcription; but contended nevertheleſs, that by its wanting the ſtatutory ſolemnities, the writing was null.

The cauſe was advocated from an inferior judge who had aſſoilzied the defender, when

The Lord Ordinary repelled the reaſons of advocation.

The purſuer reclaimed to the Court; but their Lordſhips refuſed her petition, without anſwers.

Lord Ordinary, *Braxfield.* For the petitioner, *G. Buchan-Hepburn.*

S.

N° LXXI.

N° LXXI. *November* 26. 1782.

HUGH ROSS

AGAINST

Mrs ROSS.

Forum Competens. Mutua Reconventio.

UPON the death of Mr Roſs, his eſtate of Kerſe, in Scotland, devolved on Hugh Roſs, his eldeſt ſon, ſubject to an annuity in favour of his relict, who was a native of Scotland, where ſhe likewiſe poſſeſſed a landed eſtate. His moveable ſucceſſion in England was regulated by a latter-will and three codicils, which were proved in Doctors Commons, and depoſited in that court as the warrant for letters of adminiſtration.

Mrs Roſs having found it neceſſary to deduce an adjudication againſt the eſtate of Kerſe, for her annuities; Mr Roſs commenced an action of reduction-improbation againſt her, in order to ſet aſide, as a forged deed, one of the codicils executed by his father in her favour; contending, in ſupport of the competency of this action, that the defender, a native of Scotland, poſſeſſed of heritable property here, and who was at that time inſiſting in an adjudication againſt his eſtate which was ſituated in Scotland, was obliged to ſubmit this writing to the cogniſance of the Courts of this country.

The Lord Ordinary found, "That the defender was not obliged to "produce the writing called for." And to this judgment, upon adviſing a reclaiming petition for the purſuer, with anſwers for the defender,

The Lords unanimouſly adhered.

Lord Ordinary, *Weſtball.* Act. *Geo. Ferguſſon.* Alt. *Blair.* *Menzies*, Clerk.

C.

N° LXXII.

N° LXXII. *November* 29. 1782.

AGNES PATERSON,

AGAINST

ALEXANDER SPEIRS.

ALIMENT—*of a baſtard child—both as to the* quantum *and the endurance.*

AGNES PATERSON, a woman of low rank, having brought an action againſt Speirs, who was poſſeſſed of a conſiderable eſtate, for *aliment* of a natural child of the *male* ſex, of whom he was the father, the Lord Ordinary pronounced two interlocutors, one of them reſpecting the *quantum*, and the other concerning the duration of the aliment.

The firſt was as follows: "The Lord Ordinary, as to the aliment "of the defender's natural ſon, in the circumſtances of this caſe, is "of opinion, *that the precedent eſtabliſhed by the Court, 27th January* "1779, *in the queſtion of aliment of the natural children of James Kincaid* "*of Auchinreoch, ought to be followed;* therefore modifies the aliment "of ſaid natural child of the defender's to L. 100 Scots yearly."

In this judgment both parties acquieſced.

With reſpect to the endurance of the aliment, the Lord Ordinary "found the defender only liable in payment to the purſuer of the a-"liment awarded till ſuch time as the child in queſtion arrives at the "age of *ſeven years.*"

The purſuer reclaimed to the Court againſt this interlocutor; when it was

Obſerved on the bench: There is no eſtabliſhed general rule for determining caſes of this nature; which are always to be regulated according to their peculiar circumſtances; and therefore, though in the caſe of Flint and Glendinning *, the continuance of the payment for aliment, ſought by the mother, was protracted to ten years, the child being a female; yet in the preſent, which reſpects the aliment of a boy, ſeven years appear a more proper period.

The Lords therefore adhered to the interlocutor of the Lord Ordinary.

N. B. The Lord Ordinary's interlocutor contained this *ratio decidendi*,

* *Vide* p. 106.

dendi, "In reſpect, from the nature of the buſineſs carried on by the "father, the defender, being that of bleaching, drying, and dreſſing "of cloth, the child in queſtion will be fit for being employed in "certain branches of it by the time he arrives at the age of ſeven "years." It is however to be remarked, that the Court diſapproved of this obſervation as a ground of deciſion; and that therefore it had no influence whatever on their judgment.

Lord Ordinary, *Weſtball.* Act. *J. Boſwell.* Alt. *Ilay Campbell.*
Clerk, *Menzies.*

S.

N° LXXIII. *December* 2. 1782.

HODGSON and DONALDSON,

AGAINST

THOMAS BUSHBY.

BILL OF EXCHANGE. *Notification of diſhonour.—Whether the receipt, by the holder of a bill of exchange, of a partial payment from an accepter, after a proteſt taken for not payment, liberates the drawer and indorſers.*

IN this caſe, the Lords having been of opinion, on the principles ſtated in a former report, 18th July 1782, that it was not incumbent on a perſon, upon leaving the place where he had indorſed a bill of exchange, to acquaint the holders where he was to be found or written to; Hodgſon and Donaldſon offered a proof, that in this inſtance they had enquired after Mr Buſhby's place of reſidence in London, and had endeavoured, when the bill became due, to find him there.

Mr Buſhby then offered this new defence, that the purſuers having after proteſt received a partial payment from the accepter, they could not reſort to the drawer or indorſers; in ſupport of which he

Pleaded: At any time before proteſt, the holder of a bill of exchange may receive a partial payment, and, by marking the ſum on the back of the bill, and proteſting for the remainder, may ſecure his recourſe for what is unpaid; Marius, p. 86. 87.; Scarlett, p. 126. 127. § 8. But as a diſhonoured bill ought to be returned immediately to thoſe liable in recourſe; if after taking proteſt for not payment the holder ſhall receive the ſmalleſt ſum from the accepter, this imports an abandon of his claim of relief.——Lord Raymond, vol. 1. p. 743.

Anſwered:

Answered: If the holder of a bill of exchange has made regular intimation of the dishonour, no reason can be given why his receipt of a partial payment, which is highly beneficial to those liable in recourse, by diminishing the extent of that obligation, should forfeit his claim against them. Accordingly this defence, which rests entirely on the authority of Lord Raymond, unsupported by any precedent, is contradicted by the decision; Forbes, Brown *contra* Hume, 14th November 1705.

No precise *judgment* was given on the merits of this defence, though some of the *judges* expressed their opinion that it was ill founded; and as a decision sustaining it would at once have superseded any farther proceeding, the interlocutor of the Court, allowing a proof of the circumstances alleged by the pursuers, and determining on the import of it, may be considered as an indirect rejection.

Upon advising the proof adduced by the pursuers, which did not seem to support their averments, the Lords "altered the Lord Ordi- "nary's interlocutor, and found, That no recourse lay against the de- "fender, as indorser of the bill of exchange in question."

Lord Ordinary, *Elliock.* Act. *Elphinston.* Alt. *Ilay Campbell.*
Clerk. *Orme,*

C.

N° LXXIV. *December* 2. 1782.

JAMES ADAM,

AGAINST

THOMAS JOHNSTONE.

BILL OF EXCHANGE. *Whether a bill granted by a donor,* mortis causa, *to a confident person, on purpose to effectuate his donation by means of that person's interposing his bill to the donee himself, be effectual.*

JOHN and WILLIAM RUSSEL, in the name of Adam, their indorsee in trust, sued Johnstone for payment of two bills, as having been drawn by them severally upon, and accepted in their favour, by Johnstone's deceased father, for the purpose, as they avowed, of making donations *mortis causa* to his widow, who was their sister, and Johnstone's stepmother, and to his children by her; the Russels, on the other hand, having granted equivalent bills to the donees. By these means the legacies seemed not to be immediately constituted by the donor's bills.

Pleaded

Pleaded for the purſuer: Donations, it is admitted, or legacies, cannot be conſtituted by bill of exchange; ſo that had the bills in queſtion been granted immediately to the donees, they would, no doubt, have been ineffectual. But to the Ruſſels, they do not conſtitute any donation, having been given for a ſpecific value, which was the equivalent bills accepted by them in favour of the donees; in the ſame manner as if money itſelf had been paid to the latter. That objection therefore would be miſapplied if urged on the preſent occaſion. Nor does it make any difference in the caſe, that the perſons to whom the Ruſſels granted the equivalent bills were their own ſiſter, and her infant children.

Anſwered: It is that very circumſtance which ſeems deciſive of the cauſe. The purſuers muſt admit farther, that a bill of exchange is equally invalid as a document of donation, whether it be granted through the medium of a truſtee, or immediately to the donee himſelf. Now the avowed object of the whole tranſaction above mentioned, and eſpecially of the interference of the Ruſſels, being to effectuate donations to their ſiſter and her children, their character of *truſtees*, is apparent; notwithſtanding that the mode they adopted of diſcharging the truſt was by interpoſing their own bills. Even apart from their avowal that they did this with an intention ſo very oppoſite to that of perſons who truly, or *bona fide*, bargain, exchanging a *quid pro quo*, the law would have preſumed ſimulation from the cloſe connection in which they and the donees ſtand to each other; all conjunct and confident perſons in the ſtricteſt ſenſe. The mere appearance then of bills of exchange, a circumſtance evidently or confeſſedly calculated to elude the law, cannot in reaſon merit any regard. *Plus valet quod revera agitur, quam quod ſimulatè concipitur.*

Accordingly, if, in practice, effect were to be given to ſuch a proceeding, independent of the true object of parties, thoſe ſalutary regulations of ſtatute that require to effectuate a donation, other vouchers than bills of exchange, which for facilitating commercial dealings only are exempted from the preſcribed ſolemnities, would aſſuredly avail but little. For let it be ſuppoſed that fraud in this matter is intended, and then, it is likely, two or more bills conceived in favour of different perſons, aſſociates in the crime, may be as eaſily produced as one. On the purſuer's hypotheſis, however, the reſult muſt be ſtrange. Though any one of thoſe bills alone would not, yet the whole together will neceſſarily become legal documents of donations or legacies, not leſs effectual than the moſt formal and regular deeds; ſince all that is neceſſary to their complete efficacy, is the mutual interchange amongſt the aſſociates, of bills equivalent to thoſe containing the pretended gratuities. Thus, for example, if the aſſociates A and B hold each of them a bill for L. 100; to give full effect to their ſcheme, A needs only to frame an equivalent bill as granted by him to B, and B again to do the ſame thing reſpecting A. They will then be furniſhed with preciſely the ſame argument as is urged by the purſuer, that the bills in their favour were given for value contained in thoſe which they mutually accepted in favour of each

each other. So that were that plea to be a ſucceſsful one, it could hardly hereafter be ſaid with propriety, that donations or legacies might not be conſtituted by bill of exchange, as well as by bond or latter will.

Obſerved on the Bench: Prior to the late act of Parliament, limiting to ſix years the commencement of action on bills of exchange, as they might have been brought in ſuit at any time within the period of the long preſcription, there was evidently a much greater danger of frauds being committed by means of them, than there has been ſince that enactment. Hence thoſe documents are to be conſtrued with leſs ſuſpicion and ſtrictneſs now than formerly.

The Court, in general, ſeemed to adopt the argument of the purſuer, which they did not conſider as obviated by that of the defender.

The Lord Ordinary had repelled the defence; and on adviſing a reclaiming petition, with anſwers,

The Lords adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Weſtball.* Act. *Hen. Erſkine.* Alt. *W. Steuart.*
Clerk, *Hume.*

S.

N° LXXV. *December* 4. 1782.

MICHAEL MARSHALL and RICHARD DICK,

AGAINST

JOHN CARRE of Cavers, Eſq; and others.

BOROUGH-ROYAL. *A complaint againſt a borough-election may be proſecuted after two kalendar months from the ſubſequent election have elapſed.*

IN November 1781, Marſhall and Dick, as late counſellors of Jedburgh, preferred to the Court, in terms of the ſtatutes reſpecting the redreſs of wrongs committed at elections in boroughs, eſpecially the ſtatute of the 16th of George II. a petition and complaint againſt the annual election of magiſtrates for that borough, which took place at the preceding term of Michaelmas, as having been made under the influence of bribery and corruption. The mode of ſummary complaint, it is to be remarked, authoriſed by that ſtatute,

is limited to the two kalendar months immediately following the election complained of.

No proceedings however enſued in conſequence of this complaint; nor even were anſwers given in to it until November 1782, a full year after it had been preſented, and more than two kalendar months ſubſequent to a new election of the council of the borough.

Mr Carre therefore, and other perſons intereſted, objected, that it was now too late to proſecute the complaint; and in ſupport of this objection, on the merits of which the Court ordered a hearing in preſence,

Pleaded: It is an unqueſtionable rule of law, that no action ought to be admitted, in which either of the parties has not an intereſt; and therefore, to ſhow that none of its objects can ever be gained by the preſent complaint, is all that is neceſſary for precluding its farther progreſs. The purpoſe of now proſecuting this complaint is, by ſetting aſide the election of 1781, to overturn that which took place in 1782; for as to any claim of coſts, if inſiſted on, it ſhall not be diſputed. But more than two kalendar months having elapſed ſince the time of the late election, this is, by the ſtatutes, now put abſolutely beyond challenge; for thoſe enactments, whilſt they themſelves form a complete code of rules for governing borough-elections, ſuperſede of courſe the operation of the common law. This principle was the ground of the judgment of the Houſe of Lords in the caſe of the controverted election of the borough of Anſtruther Eaſter, determined about fifteen years ago; as it was likewiſe of the more recent deciſion of the Court of Seſſion with reſpect to the borough of Wigton, June 23. 1782, Cowan and Macguffog *contra* Magiſtrates of Wigton. The ſtatutes then limiting to two kalendar months the period for bringing ſuch a challenge as the preſent, and at the ſame time putting an end to the competency of any ſuit in this matter at common law, it follows, that the proſecution of the complaint in queſtion is entirely nugatory, and ought to be diſallowed.

Anſwered: The proſecution of this complaint is certainly not nugatory, or otherwiſe every ſimilar one might be rendered equally ſo at the pleaſure of the defenders; nothing more being wanting for that end than juſt to protract the ſuit for a year, or until the time of a new election. As the perſons who ſeek ſuch redreſs may not be conſtituent members of the ſucceeding meeting for election, it will in that event be impoſſible that they can renew, either within two kalendar months, or at any other period, their complaint againſt the then nomination; for the ſtatutes confer not that power; and thus, according to the doctrine of the reſpondents, whilſt the former complaint could no longer be proſecuted, the new election would become unchallengeable. But ſurely a plea ſo fraught with inconſiſtency, and which repreſents thoſe ſtatutes as calculated only to defeat their own purpoſe, muſt at once be rejected; while, on the other hand, it is equally clear, that a ſuit conformable to the ſtatutory requiſites, ought not to be ſtopped in its progreſs to a legal determination. If it ſhall then appear that the election complained of was void, does

it

it not unavoidably follow, that perſons inveſted, by that ineffectual nomination, with the inſignia of office merely, cannot of themſelves become the legal electors on the enſuing occaſion; and by conſequence, that in a proper or legal ſenſe there could not then be any election at all? Nor is it to be imagined, that the formal mode of complaint authoriſed by the ſtatutes would be needful for overturning proceedings of ſo little ſignificancy.

The Court were clearly of opinion, that the proſecution of the complaint might be attended with full effect, and ought to be allowed. For, it was obſerved, that if the grounds of challenge were eſtabliſhed, and by conſequence the prior election ſet aſide, the ſubſequent nomination, without the neceſſity of a new complaint, muſt, agreeably to the maxim, *Reſoluto jure dantis, jus accipientis reſolvitur*, of courſe fall to the ground; and that beſides, *pendente lite nihil innovandum*; ſo that any change of circumſtances produced by the reſpondents poſterior to the complaint ought not to bar that legal method of redreſs: Rules of law, it was added, which, to preſerve their efficacy, require not the aid of any ſaving clauſe of a ſtatute.

The Lords, therefore, "repelled the objection, and allowed to the "parties a conjunct probation."

Act. *Blair, R. Dundas.* Alt. *Wight, Ilay Campbell.* Clerk, *Colquhoun.*

S.

N° LXXVI. *December* 13. 1782.

DOUGLAS, HERON, and Company,

AGAINST

MAXWELL.

BANKRUPT. *Act* 1696. *Date of the ſeiſin, not that of the regiſtration, the rule.*

IN this caſe the general queſtion occurred, How far an infeftment granted by a perſon who was rendered bankrupt within ſixty days of the regiſtration was effectual?

The arguments were the ſame with thoſe formerly urged in ſimilar caſes.

The Lord Ordinary pronounced the following interlocutor: "Having conſidered the words of the act 1696, and the deciſion of the "creditors

" creditors of Menzies in the year 1715, finds, That the deeds under " challenge are not reducible under the act 1696." And to this judgment the Lords adhered, upon adviſing a reclaiming petition for the purſuers, with anſwers for the defender."

Lord Ordinary, *Hailes.* Act. *Ilay Campbell, Sir John Belſches.* Alt. *Croſbie, Dalzell.* Clerk, *Hume.*

C.

N° LXXVII. *December* 15. 1782.

FRANCIS Earl of MORAY, and others,

AGAINST

JAMES STUART, and others.

DONATIO MORTIS CAUSA. *A ſpecial legacy bequeathed to a perſon likewiſe nominated reſiduary legatee with deſtination " to heirs and aſſig- " nees," accrues, by the predeceaſe of the legatee, to theſe heirs, as part of the reſiduary eſtate.*

CLAUSE. *A legacy to a wife, " excluſive of the* jus mariti, *and to be held " by her, her heirs and aſſignees," devolves to the heirs, notwithſtanding her predeceaſing the teſtator.*

LADY EMILIA HALKET executed a truſt-diſpoſition " of the whole " eſtate, perſonal and real, which ſhould belong to her at the " time of her death." The object of this truſt was to beſtow thoſe effects on certain perſons, to whom, by another deed, ſhe was afterwards to appoint her truſtee to convey them.

In that ſubſequent deed, which was holograph of herſelf, among a number of bequeſts of money, houſehold-furniture, and other moveables, were the following: " To my niece Mrs Stuart, for her " own proper uſe, excluſive of her huſband's *jus mariti*, all the reſt " of my houſehold-furniture, clothes, &c. And alſo I hereby ap- " point, that *the whole reſidue* of my eſtate and effects, heritable and " moveable, or proceeds thereof, remaining after anſwering and ſa- " tisfying the ſpecial appointments and proviſions made by me as " above, ſhall be paid and delivered, or ſecured by my truſtee, to " and for the uſe and behoof of the ſaid Mrs Stuart, and ſhall be " held and enjoyed by her, and her heirs and aſſignees, as her own " property, *without being ſubject* to the *jus mariti* of her huſband, which " is hereby excluded." Theſe reſiduary funds were burdened with an annuity to the ſiſter of the teſtatrix.

Lady

Lady Emilia ſurvived Mrs Stuart, her reſiduary legatee, ſeveral years; but upon her death the above ſettlement, unrevoked, was found in her repoſitories.

Oppoſite claims to theſe legacies having been made by the heirs of Mrs Stuart, and by the Earl of Moray, and other heirs at law of Lady Emilia, the truſtee convened all theſe parties in a proceſs of multiplepoinding, in which it was

Pleaded for Lady Emilia Halket's heirs at law: By the predeceaſe of Mrs Anne Stuart, both the ſpecial and the reſiduary legacy conceived in her favour have lapſed, and the claim of her heirs is precluded. The firſt mentioned bequeſt unqueſtionably fell by the death of the legatee, to whom perſonally, not to whoſe heirs, it was deviſed. Nor could it accrue to the reſiduary ſucceſſion, which was confined to the effects that ſhould remain after thoſe deſtined by ſpecial appointment had been ſeparated and withdrawn. Even ſuppoſing the heirs of Mrs Stuart then to be entitled in her right to the reſiduary funds, her ſpecial legacy would not devolve to them, but would deſcend, in the ſame manner as if no ſuch ſettlement had exiſted, to the heir at law of the teſtatrix. Unleſs this difference between the two legacies had been meant, for what end were they ſo ſeparated and contradiſtinguiſhed from each other?

But, in regard to the reſiduary bequeſt itſelf, the heirs at law have alſo a valid claim. They are aware of the terms in which it is conceived, "to and for the uſe and behoof of the ſaid Mrs Stuart, and "to be held and enjoyed *by her, and her heirs and aſſignees, as her own* "*property*, without being *ſubject* to the *jus mariti* of her huſband." There is not, however, any diſtinction thus made of this from the preceding legacy, which was indiſputably perſonal to Mrs Stuart; and, from her predeceaſe, not tranſmiſſible to her heirs. For though "heirs and aſſignees" are here mentioned, yet this legacy is not deviſed to her and to her heirs, but to herſelf alone; and therefore, it was not until ſhe had been firſt veſted in the right of it, or the effects deſtined for her had actually become "her own property," that thoſe words were to bear any application to her. Then, no doubt, the *jus mariti* being excluded, ſhe might have aſſigned to whom ſhe pleaſed ſubjects which ſhe enjoyed independent on her huſband; or, if not ſo diſpoſed of, they would have devolved to her own heirs. Nor indeed can any other interpretation than this be reaſonably admitted. Heirs and aſſignees, ſtanding here in the ſame predicament, if it be ſuppoſed that the heirs of Mrs Stuart were thus favoured, it muſt follow that her aſſignees were equally ſo; that is, that the teſtatrix meant to put it, during her own life, in Mrs Stuart's power, to ſell or gift the legacy to any ſtranger whatever, in ſuch a manner that this aſſignment ſhould be equally effectual, whether the legacy was ever to devolve to Mrs Stuart or not. That conſtruction, however, would in any caſe ſeem very extraordinary, and in the preſent involves this peculiar abſurdity, that it ſuppoſes Lady Emilia to will to confer a power in favour of Mrs Stuart, of which the latter, except ſhe had been in the knowledge of the bequeſt, a thing that is not pretended, could not poſſibly avail herſelf. The import, therefore, of the above mentioned phraſe appearing from the manner in which it is introduced,

ſufficiently diſtinguiſhes this cauſe from that of Inglis *contra* Millar, July 16. 1760, Fac. Coll.; or of Boſton *contra* Horſeburgh, Feb. 13. 1781, Ibid.

Anſwered: It is admitted that the ſpecial legacy, not having been deviſed to Mrs Stuart's heirs, became lapſed. The effect, however, was the ſame as it would have been, had any other of the various legacies of Lady Emilia fallen by predeceaſe, or been repudiated, an increaſe of that reſidue which was bequeathed to Mrs Stuart, "after "anſwering and ſatisfying the ſpecial appointments and proviſions." But it does not follow thence, that this legacy was nugatory; for after the death of the teſtatrix, it was to give immediate acceſs to the whole ſubject of it; whereas, from the reſiduary part, another perſon was to enjoy an annuity.

With reſpect to the reſiduary legacy, it is now an eſtabliſhed point, whatever ſubtilty may have heretofore prevailed to the contrary, that when a teſtator calls to his ſucceſſion a legatee and his heirs, theſe heirs, in the event of the predeceaſe, as well as of the ſurvivorſhip of the legatee, are entitled to the bequeſt, Denham *contra* Denham, January 1726, Lord Kames's Remarkable Deciſions; Inglis *contra* Inglis, Boſton *contra* Horſeburgh, *ſup. cit.* *Voluntas teſtatoris eſt ſuprema lex*; and in order to its having full effect, nothing more is neceſſary than that it ſhould be clearly underſtood. Now, that Lady Emilia meant to exclude her heirs at law is apparent. The declared purpoſe of her truſt-deed was to empower the truſtee to convey her effects, not to her heirs at law, but to thoſe perſons whom by the deed in queſtion ſhe has nominated. But whilſt it was in favour of them only that he was bound to denude himſelf, it is equally unqueſtionable, that he was in no event to become, in his own perſon, entitled to any part of that ſucceſſion; and therefore the teſtatrix muſt neceſſarily have purpoſed to call the heirs of the reſiduary legatee to ſucceed in her right, there being no one elſe to whom the reſiduary portion could poſſibly accrue. In ſo clear a caſe, the above criticiſms on the words "heirs and aſſignees," ought not to occaſion any doubt; eſpecially when it is remembered that the deed was written by the Lady herſelf. Nay the oppoſite gloſs given to that expreſſion, as if it had been put in contraſt merely to the *jus mariti*, would render it nugatory or abſurd; becauſe that once excluded, it was quite needleſs to ſubjoin, that the wife was to enjoy a free diſpoſal of the legacy. Whereas taking it as importing a deviſe to the heirs of the legatee, is not only to aſcribe to it a rational effect, but is the ſole means of preventing the ſettlement from becoming ſo far caduciary; a good ground for adopting the latter interpretation, were it really a doubtful one; for it is a rule of law, that "Legatum in "dubio ſic accipi debet, ne reddatur caducum;" Peregrin. de fidei commiſſ. p. 431.

The Lord Ordinary pronounced this interlocutor: "Finds the legacy "firſt above mentioned was ſpecially provided to Mrs Stuart herſelf, "without mentioning to whom it ſhould go at her death; and as ſhe "died before Lady Emilia Halket, finds, That the ſaid ſpecial legacy is "lapſed

" lapſed and void; but finds, That the ſame falls under and increaſes " the reſiduary funds provided to Mrs Stuart, and her heirs and aſ- " ſignees: And, laſtly, prefers the heirs and children of Mrs Stuart " to the whole reſiduary eſtate of the ſaid Lady Emilia Halket, heri- " table and moveable, conveyed by the truſt-right granted to the " raiſer of the multiple-poinding, that ſhall remain after payment of " all the ſaid Lady Emilia Halket's debts and funeral-charges, and " anſwering and ſatisfying the ſpecial appointments and proviſions, " made by her, and expences attending the truſt."

The Lords adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Braxfield.* Alt. *Maclaurin.* For the heirs at law of the teſtator, *Ilay Campbell.* Clerk, *Orme.*

S.

N° LXXVIII. *December* 18. 1782.

ANDREW GALLIE,

AGAINST

FLORENCE MACKENZIE, and her Children.

PRESUMPTION. *Whether a father's ſettling by teſtament a ſum of money on his ſon, be a ground for preſuming revocation of the ſettlement of a like ſum contained in prior bonds of proviſion.*

ABNER GALLIE, when about to enter into marriage with Florence Mackenzie his *ſecond* wife, granted a bond of proviſion for 1000 merks, payable at the time of his death, in favour of Andrew Gallie, his ſon by the former marriage.

In the contract executed on that occaſion, Abner Gallie deviſed to Florence Mackenzie in liferent 2000 merks, the fee of which he reſerved to himſelf, his heirs, or any other perſons to whom he ſhould afterwards think proper to deſtine it.

He then, in conformity to that reſervation, granted a ſecond bond of proviſion, purporting to be additional to the firſt, in favour of his ſon Andrew, for the ſum likewiſe of 1000 merks, but payable on the death of his wife. Both bonds were placed in the cuſtody of a perſon who was the common friend of all the parties.

By his latter-will and teſtament, in which he appointed the children of his ſecond marriage to be his executors, and reſerved to their mother Florence Mackenzie the liferent of 2000 merks, as formerly deviſed to her, Abner Gallie deſtined to Andrew the whole fee of that ſum,

ſum, the half of which had been already provided to him by the ſecond bond above mentioned. The teſtament, however, expreſſes no revocation of either of the bonds. It is to be remarked, too, that the liferentrix was but a little elder than Andrew himſelf.

After the death of Abner Gallie, Andrew purſued Florence Mackenzie and her children, as repreſentatives of Abner, for payment of the 1000 merks contained in the firſt bond, due at his father's death, claiming the proviſion of the ſecond, as making part of the 2000 merks bequeathed by the teſtament. This queſtion then came to be agitated, Whether, in that bequeſt, a revocation of the bonds, at leaſt of the former one, were implied?

Pleaded for the defenders: The bonds of proviſion in queſtion not having been delivered to the grantee, the purſuer, but depoſited by the granter, to be recalled at his pleaſure, were therefore revocable. For though ſuch bonds in favour of children require not delivery to render them effectual, yet, if not delivered, as they remain under the granter's power, ſo, of courſe, till his death, they are ſubject to revocation, whether expreſs or implied, direct or virtual. In fact, both the bonds granted to the purſuer have been, by the teſtament, virtually revoked. That very ſum of 2000 merks, which was to be liferented by the widow, and of which, as one half was by the poſterior bond beſtowed in fee on the purſuer, ſo the other half correſponded to the like proviſion contained in the prior bond, being here wholly and at once bequeathed to him, the neceſſary conſequence is the revocation of the preceding proviſions; although indeed the ſole effect of this revocation is no other than to render both moieties of his proviſion equally payable on the death of the liferentrix, whereas the period formerly fixed for the payment of one of them had been the death of the granter.

Anſwered: That delivery by the granter to the grantee was not neceſſary to give validity or effect to the bonds in queſtion, has been admitted; as it has likewiſe been acknowledged, that the granter did not revoke them in any expreſs or direct manner. The only point diſputed is, whether a virtual revocation be contained in the teſtamentary bequeſt to the purſuer. But it is plain that there is no room for ſuch implication, unleſs the bonds of proviſion and the legacy be conſidered as incompatible. Not any two things, however, can be more conſiſtent, than that the purſuer ſhould claim, in virtue of the bond firſt granted to him by his father, the 1000 merks which it beſtowed on him, independently of the teſtament, as well as thoſe 2000 merks contained in that ſettlement, of which indeed only one half was thereby conferred on him, the other half having been already provided to him by the ſecond bond. If, therefore, on the one hand, no words occur to expreſs a purpoſe of revoking, as little is there, on the other, any inconſiſtency in the thing to imply ſuch a deſign. That conſtruction, beſides, is in itſelf exceedingly unnatural and improbable; as it preſumes, that a father, at the moment when by repeated acts

acts he is ſhewing the moſt anxious ſolicitude for ſecuring to a favourite ſon an effectual proviſion, ſhould be willing nevertheleſs to leave him during all the days of his life entirely deſtitute; in as much as it ſuppoſes that proviſion totally withheld from him until the death of a perſon not much more advanced in years than he himſelf is.

Some of the *Judges* were of opinion, that in all caſes in which different proviſions to children have been granted, each of them, if the contrary be not expreſſed, is to be preſumed to be due; and therefore, that in this inſtance both the bonds of proviſion and the legacy ought to be ſuſtained.

But a majority of the Court conſidered the teſtament as implying a revocation of the bonds.

The Lord Ordinary having decerned in terms of the libel,

The Lords altered his interlocutor, and *ſuſtained* the defence.

Andrew Gallie preſented a reclaiming petition againſt this judgment, which was refuſed without anſwers.

Lord Ordinary, *Alva.* Act. *Alex. Abercromby.* Alt. *Swinton.*
Clerk, *Menzies.*

S.

N° LXXIX. *January* 21. 1783.

Lord BANFF, and others,

AGAINST

Earl FIFE.

SALMON-FISHING. *Not neceſſary, in forbidden time, to remove the ſole-trees or ſide-poſts of cruive-boxes, but only the hecks and inſcales.*

IN an action, at the inſtance of Lord Banff, and the other proprietors of fiſhings in the upper part of the river Doveron, againſt Earl Fife, owner of thoſe below,

The Lords found, "That it was not neceſſary to remove *the ſole-trees or ſide-poſts* of the cruive-boxes in forbidden time; the

" removing of *the hecks and inſcales* being ſufficient" to anſwer the purpoſes of the law.

Act. *G. Buchan-Hepburn, R. Dundas.* Alt. *Ch. Hay.* Clerk, *Home.*

S.

N° LXXX. *January* 22. 1783.

Earl of LAUDERDALE,

AGAINST

Earl of EGLINTON.

COMPETITION—*between the ſingular ſucceſſor of a reverſer, entitled to redeem for an eluſory preſtation, and the heir of the nominal fiar.*

PRESUMPTION—*of redemption, from lapſe of time, and poſſeſſion in the right of the reverſer.*

THE Earls of Lauderdale and Eglinton having both laid claim to the patronage of the pariſh church of Dundonald, their reſpective pretenſions came to be tried in mutual proceſſes of declarator.

The titles of both the claimants were derived from one ſource, the family of Abercorn, but were thus differenced:

In 1642, John Earl of Lauderdale was *infeft* in this patronage, among other ſubjects contained in a charter under the Great Seal, purporting to have proceeded on a diſpoſition granted by James Earl of Abercorn. The charter and ſeiſin, but not the diſpoſition, were produced. It did not, however, appear that theſe ſubjects had ever, from that time downward, been tranſmitted by any of the poſterior title-deeds of the family of Lauderdale; the preſent Earl having made up his title by adjudication on a truſt-bond.

On the other hand, the Earl of Eglinton connected his title with that of the Earl of Angus, as diſponee of James Earl of Abercorn. The Earl of Angus, indeed, did not obtain a charter of thoſe ſubjects for eleven years ſubſequent to the date of that on which Lord Lauderdale's claim was founded; but then the right was regularly tranſmitted from him to Lord Eglinton, by an uninterrupted ſeries of titles, extending through the whole intermediate period.

It is farther to be remarked, that in the regiſter of reverſions a copy of a bond of reverſion was found, granted by John Earl of Lauderdale the day after the date of the diſpoſition in his favour, obliging himſelf and his heirs, on receiving, at any time, payment of a double angel

angel of gold or twenty merks, to rediſpone the ſubjects to Lord Abercorn, his heirs and aſſignees.

With reſpect to the exerciſe of the patronage in queſtion, the parties were more on an equality; the right of neither appearing to have been followed by any proper act of poſſeſſion; although Lord Eglinton and his predeceſſors had all along poſſeſſed the other ſubjects which were conveyed to them together with the patronage.

The queſtion, therefore, which occurred between theſe parties, and on which the Court ordered a hearing in preſence, was, Whether in theſe circumſtances, the prior right of Lord Lauderdale, or the poſterior one of Lord Eglinton, ſhould, *in hoc ſtatu* at leaſt, be preferred.

Pleaded for the Earl of Eglinton: It was merely a conveyance in truſt, which the Earl of Abercorn executed in favour of John Earl of Lauderdale in 1642. Of the nature of this truſt the bond of reverſion granted by him is a full proof; the tenor of that obligation, as improbation is not proponed againſt it, being, by the extract produced, ſufficiently aſcertained, in terms of the ſtatutes of 1469 and 1617.

Although therefore no direct evidence has been diſcovered to prove actual redemption, and even though it were ſuppoſed that none had taken place; yet it is thus manifeſt that, notwithſtanding the conveyance, the true or ſubſtantial right remained unimpaired with the diſponer; whilſt the right of Lord Lauderdale, ſubject to an unlimited power of revocation, conſiſted barely in a name. That reſerved faculty, almoſt the only thing implied in the tranſaction, has been ſecured by the bond of reverſion; and, if not likewiſe ſtipulated in the charter produced by Lord Lauderdale, it is becauſe at that period powers of revocation were not deemed to be effectually retained in ſettlements or conveyances, by the inſertion of any clauſe, however expreſſive of the intention. In the ſame manner, as in the preſent inſtance, the faculty of redemption for an eluſory ſum was then ordinarily ſubſtituted in its place; a practice of which the tailzie of the eſtate of Kintore, recorded in July 1578, and the ſettlement of that of Cromarty, may be alſo mentioned as examples. But the revocation of rights merely nominal being the object of that ſtipulation, it was by no means needful to follow out a formal and regular order of redemption; ſo that it is of no conſequence to the preſent caſe, whether ſuch occurred in it or not. Though ſtrict feudal forms are doubtleſs to be obſerved, yet it is only when eſſential to rights, not when ſolely calculated for eluſory purpoſes. Thus in the caſe of Roſehall, a clauſe of redemption in an entail was, without the order having been uſed, found to be equivalent to a power of revocation. On the ſame principle was the determination of the Houſe of Lords in that of Forbes of Pitſligo, 9th March 1756; Fac. Coll. And in effect a ſimilar judgment was given by the Court of Seſſion in the caſe of Cromarty.

Still however this argument goes on a ground more favourable to the Earl of Lauderdale, than juſt; for it is not truly to be ſuppoſed that

that in this caſe the order of redemption was not actually accompliſhed. *Poſt tantum temporis*, the preſumption of law is, for its due obſervance; ſince to Lord Eglinton the right in queſtion, from the time it was *de facto* conveyed to the author of his predeceſſors, has deſcended through an unbroken courſe of ſucceſſion, by titles on which, as to the other ſubjects of them at leaſt, conſtant poſſeſſion has followed; whilſt no ſuch tranſmiſſion appears in favour of Lord Lauderdale, or his authors; and as little proof is there of the right of patronage having been exerciſed by any of them ſince 1649.

Anſwered for the Earl of Lauderdale: In regard to the actual exerciſe of this right of patronage, if Lord Lauderdale's authors have not enjoyed it, not more have thoſe of Lord Eglinton; and therefore here parties will but ſtand on an equal footing. With reſpect to the conſtitution of the right, a difference appears in their ſituation; but it is in favour of the former. The extract produced is not equal to a principal bond of reverſion. By the ſtatute of 1469, indeed, ſuch extracts were held as valid documents; but in conſequence of a poſterior enactment in 1617 they can only bear faith "when they are not "offered to be improven;" which as to that in queſtion is now ready to be done.

But ſuppoſing this extract to be probative, and the ſtipulation reſpecting redemption to have intervened, ſtill however the right of reverſion will not operate *ipſo jure*. The conveyance in favour of Lord Lauderdale was undoubtedly in itſelf valid, and of conſequence he and his ſucceſſors were to remain veſted in the feudal right, until it ſhould be legally taken from them; which could only be done by the executing of the order of redemption, or by means of adjudication in implement. To ſay, that becauſe in ſome caſes ſuch a diſtinction may exiſt as that between ſubſtantial and nominal rights, no compliance with legal forms, nor any attention to them is requiſite with regard to the latter, is a doctrine that were equally dangerous to the ſtability and order of the law, as it is in itſelf unſupported by any authority. No right, it will be owned, more purely nominal can be imagined, than is the fictitious conſtitution of many freehold qualifications; yet not even that ſhadow of a right can be ſet aſide *de plano*; but in order to reſtore the title of the party from whom it flows, he muſt pay obedience to all the legal forms.

It is true, that, for the reaſon ſtated on the other ſide, family ſettlements have ſometimes been framed by means of deeds, which, though *ex facie* complete in themſelves, and unlimited, were yet ſubject to a ſeparate obligation of reverſion, to be effectuated by an eluſory redemption. The law however is not to be influenced by the ſecret purpoſes, but by the overt acts of parties; and of courſe, after a conveyance has been made, the ſolemnity of reconveyance thus becomes indiſpenſable. Thoſe caſes which have been referred to, give truly no countenance to the oppoſite doctrine. The caſe of Kintore had not the ſanction of any judgment of the Court; that of Roſehall was determined by the law of preſcription; and with reſpect to that of Pitſligo, it was the perſonal right of a father, who together with his ſon derived

rived a title from a third party, which, by the Houſe of Peers, was found to fall under his forfeiture; ſo as to occaſion the reverſal of the deciſion of the Court of Seſſion. In the caſe of Cromarty, the ſecond tailzie proceeded on the narrative, that the order of redemption had been uſed.

Indeed, were this argument, of the independence of ſubſtantial rights upon legal forms, of any ſolidity, why, it might be aſked, on the other hand, cannot an apparent heir tranſmit without any formality, the ſubſtantial right with which he is veſted? No reaſon for it could then be aſſigned; for that he might, and other the like incongruities, would plainly be unavoidable conſequences of a doctrine which has no foundation in law. Thus it is evident, that however much a nominal right that of Lord Lauderdale's author may have been, a reconveyance nevertheleſs, or an order of redemption, was neceſſary for the reinſtating of the diſponer Lord Abercorn, or his ſucceſſors; and therefore, as at this moment Lord Lauderdale ſtands undiveſted of the patronage in queſtion, he is, *in hoc ſtatu*, at leaſt, entitled to the legal exerciſe of that right.

Obſerved on the Bench: The extract of the bond of reverſion not being challenged in a reduction-improbation, is for that reaſon to be accounted a good document; and even though it were challenged, it would ſtill be not leſs effectual, becauſe from the poſſeſſion its tenor would be proved. The bond gives a power to alter; but becauſe that is a perſonal faculty, does it follow, that by its not being exerciſed, the feudal right would become complete and unlimited in the diſponee? No; for the true and ſubſtantial right always remained with the diſponer. On this principle, judgment was pronounced with reſpect to the entail of the late Lord Lovat; a caſe omitted in the pleadings. There it was argued, that the reſervations in that deed being merely perſonal faculties, his ſon's right to the eſtate did not fall by his forfeiture; but it was found, that a nominal fee only exiſted in the ſon, while his father continued ſtill veſted in the ſubſtantial right, which was affectable by his debts and deeds, and of courſe by his forfeiture. In like manner, in the preſent caſe, the ſubſtantial fee in Lord Abercorn, (not ſo as to the nominal right of Lord Lauderdale), was ſubject to his debts and deeds, and had he incurred forfeiture, would have fallen under it. It is for a ſimilar reaſon that a *donatio inter virum et uxorem* is, though unrevoked, ineffectual againſt creditors, when there is a deficiency of funds. As therefore Lord Abercorn *de facto* conveyed away the eſtate, that was a ſufficient extinction of the nominal fee. But indeed were it neceſſary *poſt tantum temporis*, the actual redemption ſhould be preſumed.—Even independently of theſe obſervations, the right of Lord Eglinton being continued down to the preſent time by a regular ſeries of titles, and clothed with poſſeſſion, is to be eſteemed preferable to that of Lord Lauderdale, on which not only no poſſeſſion has followed, but which has not even been tranſmitted to him through any part of the period intervening from its origin till now. Its antiquity, in theſe circum-

ſtances, is unfavourable to his claim; and until the warrants be produced of his charter and infeftment, theſe laſt are to be deemed abſolutely of no avail.

The majority of the Court however ſeemed to diſapprove the idea of a charter and ſeiſin, though of an old date, being unavailing from the want of poſſeſſion.

Some of the Judges did not admit the preſumption of redemption *poſt tantum temporis*, and objected to the effect allowed to the diſtinction between real and nominal rights; obſerving, that though there was good ground for diſregarding in future the nominal right of Lord Lauderdale, yet as long as he was not diveſted of it, he was entitled to its effect; for ſo long the right of Lord Eglinton, though redeemable, was not in fact redeemed; and its redemption ought not to have a retroſpect.

But the Court in general adopted the preſumption, and therefore,

The Lord Ordinary having "aſſoilzied from the concluſions of declarator at Lord Eglinton's inſtance; and preferred Lord Lauderdale to the patronage in queſtion;"

The Lords "altered that judgment, and found the right of Lord Eglinton to be preferable."

Lord Ordinary, *Hailes*. For the Earl of Eglinton, *Wight*, *J. Boſwell*.
For the Earl of Lauderdale, *Ilay Campbell*. Clerk, *Home*.

S.

N° LXXXI. *January* 23. 1783.

CREDITORS of DAVID TURNER,

AGAINST

His CHILDREN.

PRESUMPTION.—*Delivery*.

THE Duke of Buccleugh being debtor to David Turner in the balance of the price of ſome heritable ſubjects, granted bond obliging himſelf to pay the legal intereſt of the debt to David Turner during his lifetime, and after his death to pay the principal ſum to his children *nominatim*, and to their reſpective heirs. In the event of the death of the children, the bond farther provided, that the ſums due to them ſhould be exigible by two of their relations, for behoof of their iſſue.

This

This bond was delivered by the Duke's doer, not to David Turner, but to the perſon who had conducted the ſale for him; and it remained there till ſome years after, when David Turner became inſolvent.

A queſtion then aroſe between his creditors and his children concerning the fee of this bond; when the former

Pleaded: Deſtinations in favour of children in bonds of borrowed money, though conceived in terms appearing to denote a diveſtiture of the father, as they occur in contracts to which the children are no parties, and in which they have no title to interfere, convey to them only a *ſpes ſucceſſionis*. Like bonds of proviſion, they remain ſubject to revocation, and conſequently to the father's debts, unleſs the deeds in which they are contained, have been either delivered for the childrens expreſs behoof, or put upon record, or followed with ſome other act equivalent to delivery, Dict. of Deciſ. *voce* Preſumption.—Without this, perſons, after having acted while in affluence as unlimited proprietors of their funds, would have it in their power, upon their inſolvency, to withdraw theſe from their creditors.

Anſwered: A bond remaining in the cuſtody of the granter, or, which is the ſame thing, in the cuſtody of thoſe who act for him, is an incomplete deed, over which he has unlimited power; and the only difference between bonds of proviſion and others, is, that the former may be validated by the death of the granter, and without any delivery.

But where, in a bond of borrowed money, the right of the original creditor ſtands limited by the conception of the deed, in favour of a third party, no farther ſolemnity is requiſite. The moment ſuch a bond is delivered by the debtor, no matter to whom, it becomes an effectual and irrevocable voucher to every one favoured by it. Nor can creditors be prejudged by tranſactions of this ſort. It cannot be imagined, that in order to defraud his own creditors, a perſon in affluent circumſtances will be induced to diveſt himſelf of his eſtate.

One of the *Judges* ſeemed to be of opinion, that if the bond in queſtion had been delivered to the father, and had remained till the bankruptcy in his cuſtody, the fee veſted in the children might have been conſidered to be of a revocable nature. Another, however, whoſe opinion was followed by the Court, obſerved, that although in bonds granted directly by a father to his children, the delivery in a queſtion with the granter's creditors, muſt be proved by the children, the law was different in caſes like the preſent. Without enquiring, therefore, in what manner the poſſeſſor of this bond had received it, the Lords

"Found, that the fee was in the children, and could not be attached for the debts of the father."

Lord Ordinary, *Gardenſton.* For the Creditors, *Baillie, M'Cormick.*
For the Children, *Geo. Wallace, Ilay Campbell.* Clerk, *Hume.*

C.

N° LXXXII.

N° LXXXII. *January* 25. 1783.

JOHN MACKENZIE,

AGAINST

DONALD MUNRO.

MEMBER OF PARLIAMENT. Act 16. Geo. II. cap. 11. *The claim of an apparent heir to be inrolled, muſt, in the ſame manner as any other, be lodged two months before the Michaelmas meeting.*

IN this caſe, Mr Munro, in the character of apparent heir to his brother, having been inrolled at the Michaelmas meeting 1782, as a freeholder in the county of Roſs, although no claim had been lodged for him till two days before the meeting, the Lords, upon a complaint in the name of Mr Mackenzie, founded on the ſtatute 16. Geo. II. cap. 11. § 7.

Found, " That the freeholders did wrong in admitting Mr Munro " to the roll of freeholders, and granted warrant for his name " being expunged."

Act. *Elphinſton.* Alt. *Abercromby.* Clerk, *Campbell.*

C.

N° LXXXIII. *January* 25. 1783.

ROBERT CRAIG,

AGAINST

The CREDITORS of Riccartonholm.

ADJUDICATION—*led after decreet of certification has been extracted, entitled to no preference in the ranking.*

IN the ranking of the creditors of Riccartonholm, the Lord Ordinary found, " That Robert Craig's adjudication having been led " after the proceſs of ranking, in which he produced his intereſt, had " been brought into Court, and a decreet of certification pronounced " and

" and extracted, he is not entitled to any preference in virtue of ſuch " adjudication, and ought therefore to be ranked as a perſonal cre- " ditor."

Againſt this judgment Robert Craig *reclaimed*, and

Pleaded: Adjudications, with the exception ariſing from the ſtatute 1661, in favour of thoſe which are led within year and day of the firſt effectual one, are to be conſidered as ſales under redemption, which are preferable according to their priority; nor have the acts 1681 and 1690, authoriſing the ſale of bankrupt-eſtates, introduced any alteration in this reſpect. From the nature of this diligence, therefore, no reaſon can be aſſigned why the petitioner, upon production of his decreet of adjudication, ſhould not be preferred to thoſe who either have not adjudged at all, or have taken this meaſure poſterior to him.

The penal effects of a decreet of certification, in caſes of this ſort, are confined ſolely to thoſe rights affecting the eſtate under ſale, which exiſted, and could have been produced when it was pronounced, and no benefit can be derived from thence by creditors who have not been preferred in the ranking. Hence the preference of thoſe rights which have been acquired after the decreet was pronounced, and of thoſe creditors who have no real lien over the eſtate, muſt be the ſame as if it had never taken place. Indeed, were the Lord Ordinary's interlocutor well founded, as a decreet of certification may be obtained in a period far ſhort of a year, it would be in the power of an adjudging creditor to exclude the operation of the ſtatute 1661.

This petition was refuſed without anſwers.

Lord Ordinary, *Elliock.* For Robert Craig, *Cha. Hay.*

C.

N° LXXXIV. *January* 26. 1783.

MATTHEW LITTLE,

AGAINST

The CREDITORS of Tundergarth.

EXECUTION. *Edictal citation of a party as forth of the kingdom, when he was in Scotland, null.*

THE Viſcount of Stormont, ſuperior of the lands of Tundergarth, after an abſence of ſeveral years from Scotland, arrived there in the beginning of Auguſt 1779, and returned to England on the 18th of September following.

On the 26th of Auguſt of that year, Matthew Little, who had adjudged theſe lands from the vaſſal, executed a charge againſt his Lordſhip as forth of the kingdom; and having inſiſted on his diligence as the firſt effectual, the other creditors *objected* that the charge ought to have been executed by perſonal citation.

The Lord Ordinary ſuſtained the objection. And to this judgment the Lords adhered, upon adviſing a petition for Matthew Little without anſwers.

Lord Ordinary, *Braxfield.* For the petitioner, *Henry Erſkine.*

C.

N° LXXXV. *January* 31. 1783.

Ranking of the CREDITORS of the YORK-BUILDINGS COMPANY.

FOREIGN. *Contracts executed according to the ſolemnities of the* lex loci, *effectual in Scotland.*

SO early as the year 1727, the Company of Undertakers for raiſing Thames water in York-buildings, which had been incorporated by an act of William and Mary, was obliged to raiſe money upon annuities, which were ſecured on its landed property in England and Scotland, and, together with other real incumbrances, exhauſted altogether its annual income till about the year 1777.

During this period, and for ſome time before, the Company had iſſued a variety of bonds conceived in the Engliſh form, which had been tranſmitted by the original creditors by indorſements, frequently blank in the name of the indorſees, and had been made at different times the foundation of proceſſes of adjudication and other diligence againſt the Company's eſtates.

In the year 1777, an act of parliament for ſelling the eſtates belonging to the Company was obtained, and a ranking of the creditors enſued; in which the following objections were ſtated by the common agent:

Firſt, That the grounds of debt were defective in the ſolemnities required by the law of Scotland.

Second, That the bonds of the Company could not be transferred from one creditor to another by indorſation.

Third, That blank indorſations of theſe bonds fell under the ſtatute 1696 concerning blank writs.

Theſe

Theſe objections, becauſe urged againſt contracts which were valid according to the law of that country where they had been entered into, were diſregarded by the Court.

Lord Reporter, *Monboddo.* For the common agent, *Lord Advocate (Dundas), Blair, Buchan-*
Hepburn, Elphinſton. For the other creditors, *Ilay Campbell, Wight.*
Clerk, *Colquhoun.*

C.

N° LXXXVI. *January* 31. 1783.

Ranking of the CREDITORS of the YORK-BUILDINGS COMPANY.

FOREIGN. *Vicennial limitation of Engliſh penal bonds.*

THE greateſt part of the debts due by the York-buildings Company were conſtituted in the form of Engliſh penal bonds, the nature of which is, that the debtor, upon his failure to pay at the ſtipulated term, is ſubjected in the double of the ſums advanced.

The creditors in ſome of theſe bonds, upon which no diligence had followed for more than twenty years after the term of payment, having claimed to be ranked, the common agent

Pleaded: By the law of England, which muſt limit the endurance of debts contracted in that country, a preſumption of payment ariſes from bonds of this ſort having been allowed to lie over for twenty years, which cannot be elided but by proof brought by the creditor that the debt is ſtill outſtanding.

Anſwered: The bankrupt ſituation of the Company ever ſince theſe bonds were granted, and the real incumbrances which affected their property of every kind, remove in this caſe all preſumption of payment ariſing from the creditors taciturnity.

The Lords " repelled the objection, in reſpect, from the ſpecial " circumſtances of this caſe, there is no room for the preſump- " tion of the bonds having been paid by the Company."

Lord Reporter, *Monboddo.* *Partibus ut ſupra.*

C.

N° LXXXVII.

N° LXXXVII. *January* 31. 1783.

Ranking of the CREDITORS of the YORK-BUILDINGS COMPANY.

FOREIGN. *A creditor by an Engliſh penal bond, after obtaining decreet of adjudication, is entitled to intereſt on the penal ſum.*

OF the penal bonds iſſued by the York-buildings Company, ſome had been ſecured by adjudication againſt the Company's eſtates in Scotland, before twenty years had elapſed from the term of payment. The creditors in theſe having inſiſted to be ranked for the penal ſums contained in their decreets of adjudication, and for intereſt thereafter till paid, the common agent

Pleaded: By the tenor of theſe bonds, the obligation of the debtor can in no event exceed the penal ſum; nor is effect, by the practice of England, ever given to them beyond that extent. Hence, as the object of the diligence of adjudication is the ſecurity of the debt, and not its enlargement, the creditors can be ranked only for the penal ſum.

Anſwered: Though to the effect of reſtoring debtors againſt the penal conſequences of an expired legal, adjudications be now conſidered merely as ſecurities, they are, in their proper nature, ſales under reverſion. Juſtice, therefore, will not permit the reverſer, by delaying to redeem, to forfeit his creditor of the advantage the latter would have derived from the uſe of his money.

The Lords found theſe creditors entitled to be ranked, not only for the penal ſums, but alſo for the intereſts thereon after the date of their ſeveral decreets of adjudication.

Lord Reporter, *Monboddo.* *Partibus ut antea.*

C.

N° LXXXVIII.

N° LXXXVIII. *January* 31. 1783.

Ranking of the CREDITORS of the YORK-BUILDINGS COMPANY.

FOREIGN.—*Creditor by an Engliſh bond can never demand more than the penal ſums.*

AMONG the creditors of this Company by penal bonds, ſome, by way of liquidating the damage they ſuſtained, by loſing the intereſt of their money after twenty years had elapſed from the term of payment, obtained decreet in their proceſſes of adjudication, not only for the penal ſums, but alſo for a fourth part more, and claimed to be ranked accordingly.

It appeared from the opinion of Engliſh counſel, that bonds of this ſort at no period created a demand for more than the penal ſums.

The Lords therefore found, "That the adjudications when led for "more than the penal ſums in the bonds, were to be reſtricted "to a ſecurity for payment of an accumulated ſum not exceed- "ing the penal ſums and intereſt of ſuch accumulated ſum from "the date of ſuch adjudication till paid."

Lord Reporter, *Monboddo.* *Partibus ut antea.*

C.

N° LXXXIX. *February* 5. 1783.

JOHN and HUGH PARKERS,

AGAINST

DOUGLAS, HERON and Company.

COMPETITION.—*Diſponees in ſecurity with the diſponer's perſonal creditors, who had executed a poinding of unripe crops.*

IN 1774, James Campbell being debtor to Douglas, Heron and Company to a large amount, by a deed, containing procuratory of reſignation and precept of ſeiſin, and on which infeftment followed,

" ſold, alienated, and diſponed his lands of Adamhill, &c. in ſecuri-
" ty to them," redeemable upon payment of the principal ſums and annualrents. The deed farther contained an aſſignation to the rents and profits, with a power to take the ſubjects into their own poſſeſſion, to grant leaſes, to appoint factors without being liable but for their own intromiſſions, and to ſell the lands by public auction.

A conſiderable part of the lands was allowed to remain in the debtor's natural poſſeſſion; and on the 31ſt of May 1780, Meſſrs Parkers, creditors to him by bill of exchange, executed a poinding of the growing crops. In Auguſt following, before they had completed their diligence by cutting down and ingathering, the Sheriff of the county, upon the application of Douglas, Heron and Company, awarded a ſequeſtration over the lands, in ſecurity of the current annualrents due to that Company.

This judgment was brought under review of the Court of Seſſion by a bill of advocation, at the ſuit of Meſſrs Parkers, who likewiſe brought an action of declarator, for having it found, that they had right to the ſubjects in the hands of the ſequeſtrators.

Pleaded in defence for Douglas, Heron and Company: The infeftment in favour of the defenders effected a complete transference of the debtor's eſtate, defeaſible only upon full payment of the debt and annualrents. Hence they are entitled to every benefit which would have been competent to a purchaſer; and as no arreſtment uſed in the hands of the tenants, by a creditor of the diſponer, could have affected their intereſts; ſo, as to lands in the diſponer's natural poſſeſſion, to the effect at leaſt of drawing a full rent, they muſt be in the ſame ſituation as if they had granted a leaſe to him.

Even in the character of creditors heritably ſecured, the defenders preference muſt be unqueſtionable. Although the ſtatute 1469, § 36. has provided, That in the action of poinding the ground, the goods of tenants ſhould only be attached for their landlord's debts to the extent of the rents due by them; yet the creditor is ſtill entitled, to the excluſion of all others, to attach without limitation every ſpecies of moveables which are the property of the debtor, and found on his lands.

This privilege, which is of the ſame endurance with the debtor's right of property, requires not for its conſtitution the intervention of any action. As a landlord has a property in the fruits till his rent is paid; ſo to the extent of his debt, the creditor, by his right of ſecurity, has theſe impledged to him. He cannot indeed, like the landlord, recover thoſe which have been ſold, or evicted by the complete diligence of other creditors; but ſo long as the property remains in the debtor, he is entitled to aſſert his preference, without actual execution by poinding the ground, which is only neceſſary to operate payment when not voluntarily made. Hence rents being arreſted for a perſonal debt, a creditor infeft appearing in the forthcoming will, without any poinding, be preferred; Kames's Remarkable Deciſions, Creditors of Kelhead againſt Lady Kelhead; July 13. 1780, Webſter *contra* Hay Donaldſon. And hence in a competition between two annual-

renters,

renters, the Court found the firſt annualrenter purſuing a poinding of the ground, preferable to a ſecond annualrenter in poſſeſſion; Stair, January 9. 1668, Lady Clerkington. Upon the ſame principles, when a perſonal creditor is proceeding to poind, one heritably ſecured producing his intereſt at any period before the complete execution of that diligence will be preferred for the annualrents already due; by ſequeſtration, he may ſecure thoſe which are ſtill current. A contrary doctrine, by aboliſhing his preference in ſubjects in the debtor's poſſeſſion, would exceedingly impair his ſecurity.

Farther, The infeftment on record being equivalent to an intimation of the aſſignment in favour of the defenders, of the *rents* and *profits* of this eſtate, Webſter *contra* Donaldſon, *ſup. cit.* it muſt be preferable to every ſubſequent diligence uſed for attaching the produce.

Anſwered: There are in the law of Scotland only two ſorts of debts which create a preference on the fruits of land; the rents due to a proprietor, ſecured by the hypothec, and *debita fundi*, which are made effectual by an action of poinding the ground. In the character of purchaſers under redemption, therefore, the defenders are entitled to no privilege. As they have ſtipulated no rent, they have no right of hypothec; and being proprietors, the action of poinding the ground is altogether incompetent; Erſkine, book 4. tit. 1. § 11. March 2. 1631, Gartland *contra* Lord Jedburgh. On this footing the debtor muſt be underſtood to have poſſeſſed on a *precarious tolerance*; Stair, book 1. tit. 11. § 10.: And although perhaps liable, on principles of equity, to the defenders in a recompence for the uſe of their ſubject, he muſt be proprietor of the produce to every effect, either of voluntary or legal alienation.

But the defenders infeftment, however conceived in terms appearing to denote a transference of the property, imports no more than an incumbrance or ſecurity, which in its nature and effects is eſſentially different. In a right of property, whether the deed of conveyance be unconditional, or qualified with clauſes of reverſion, the diſponer is completely denuded; and the powers inherent in property, of poſſeſſing the lands, letting them to tenants, uplifting the rents, and the rights of electing members of Parliament, &c. can be exerciſed by the diſponee alone. In ſecurities again, whether conſtituted in the form of an infeftment of annualrent, where without any ſecurity for the ſum lent the lands are burdened with a certain yearly duty; of an heritable bond where the real right is acceſſory to the perſonal obligation; or of a diſpoſition in ſecurity, ſuch as occurs in the preſent inſtance, matters are in a ſituation totally different. In theſe, though ſome of the powers already noticed may, for the conveniency of creditors, be ſuperadded by expreſs proviſion, the right created by the infeftment over the lands themſelves is no more than a pledge, analogous to the *hypotheca* known in the Roman law, which is perfectly compatible with the radical right remaining in the debtor, and with the exerciſe by him of every faculty attending on property. Hence in a late queſtion between Taylor of Southfodd, and his Creditors, the Lords found, that an infeftment in ſecurity did not entitle the

the creditors to purſue a removing againſt the debtor: And hence, though rights of property cannot be loſt by the negative preſcription, heritable ſecurities of every denomination may be extinguiſhed in that manner; March 3. 1758, Naiſmith *contra* Anderſon.

With regard to the fruits of lands affected by ſecurities of this ſort, they remain the property of the debtor, and ſubject to his debts and deeds, till the creditor, by the action of poinding the ground, or ſome other diligence, has appropriated them to himſelf. Indeed it appears, that by the ancient practice no preference whatever was created in favour of the incumbrancer over other creditors. Thus a creditor, in conſequence of a prior arreſtment of rents, was preferred to an appriſer; Durie, March 23. 1636, Gray *contra* the Tenants. And although, in the competitions of the creditors of Kelhead and Saintford, this rule ſeems to have been departed from in the caſe of arreſtments, becauſe that diligence is not productive of any real *lien*; no argument can with propriety be adduced from thence with regard to poindings, by which a transference of property is effected; February 15. 1707, Lady Mary Bruce *contra* Cochrane of Ochiltree.

The introduction of a preference of this ſort would be the ſource of much fraud and undue advantage among creditors. By withholding it till diligence be uſed by another creditor, in the manner here practiſed, the heritable creditor might for ever maintain a bankrupt in the poſſeſſion of his moſt valuable moveable effects. An opportunity is thus offered to him of preferring one creditor to another, as whim or intereſt ſhall direct. And as perſonal creditors, though appriſed, by the records, of the conſtitution of the ſecurity, muſt be altogether ignorant of its extinction by payment or intromiſſion, it is in the power of the heritable creditor to thwart their diligence after his debt has been completely ſatisfied. From motives of expediency, therefore, the heritable creditor, in order to entitle him to any preference, ought to be obliged, either by letting the lands to tenants, or by himſelf aſſuming the poſſeſſion, to acquaint the public of the debtor's real ſituation. In the firſt caſe, in virtue of the aſſignation to the mails and duties, and the conſequential powers for making theſe effectual, he may enjoy, without any inconveniency to himſelf, the right of hypothec competent to the proprietor. In the other, the produce will undoubtedly belong to him.

With reſpect to the aſſignation to the *rents and profits*, that relates ſolely to the rents and caſualties due by tenants, and cannot with any propriety be extended to crops raiſed by the debtor.

The queſtion here agitated was thought to be attended with conſiderable difficulty. By one interlocutor, the Court, moved with the particular terms of the defenders right, and the apparent inconvenience ariſing from an arbitrary exertion of a preference of this nature, decided in favour of the perſonal creditor. But their ultimate judgment, reſting on the conſideration of the defenders right as an ordinary heritable ſecurity, and the purſuers diligence as incomplete when the ſequeſtration was awarded, was in favour of the creditors infeft.

The

The Lords aſſoilzied Douglas, Heron and Company, from the concluſions of the ſummons of declarator, and preferred them to the ſums in the hands of the ſequeſtrators.

Lord Ordinary, *Weſthall.* Act. *Maclaurin, Rolland.* Alt. *Wight, Ilay Campbell.*
Clerk, *Home.*

C.

N° XC. *February* 5. 1783.

JAMES KINNEAR,

AGAINST

JAMES PETER.

JURISDICTION—*of the Court of Seſſion competent, in the firſt inſtance, to a queſtion between a mariner and his apprentice.*

KINNEAR having, by indenture, become the apprentice of Peter a ſhipmaſter, in his ſeafaring occupation, brought againſt him, before the Court of Seſſion, an action of damages, on account of an alleged failure in the performance of the contract.

Peter objected, that the cauſe being of a maritime nature, could not be tried there *in the firſt inſtance.*

The Lord Ordinary " repelled the objection to the competency of " the juriſdiction."

In a reclaiming petition preferred to the Court, it was argued for Peter, That the contract between the parties related to nothing but maritime or ſeafaring matters; it being the duty of a ſeaman's apprentice, which, on one hand, was undertaken, and, on the other, the charge of training up and inſtructing ſuch a perſon in the art and buſineſs of a mariner; and therefore, that in the firſt inſtance, the juriſdiction of the Court of Seſſion was not competent. But,

The Lords refuſed the petition without anſwers.

Lord Ordinary, *Alva.* For the petitioner, *Nairne.*

S.

N° XCI. *February* 5. 1783.

Sir JOHN STEWART, Baronet,

AGAINST

Poor ALEXANDER LESLIE.

PRISONER.—*Act of grace,—Whether applicable to perſons impriſoned for penalties impoſed for the ſecurity of the revenue.*

BY ſtatute 5 Geo. III. c. 46. perſons ſelling exciſeable liquors in Scotland without a licence, are made liable to a penalty of 30s. for the firſt *offence*, of 40s. for the ſecond, and of L. 5 for every ſubſequent one; to be recovered before the ſheriff or bailie courts, or before any two or more juſtices of the peace; and to be made effectual, either *by the uſual execution of the law of Scotland*, or *by diſtreſs and ſale* of the *offender's* goods, under the authority of the judge before whom the *conviction* took place.

Alexander Leſlie was, in conſequence of letters of caption, incarcerated for a contravention of this ſtatute; and he having applied to the magiſtrates of the burgh where he was impriſoned for an aliment, in terms of the ſtatute 1696, uſually called the act of grace, the queſtion occurred between him and Sir John Stewart, ſolicitor of his Majeſty's ſtamp-duties, whether that act related to confinements of this ſort.

Pleaded for the priſoner: Where an action, not immoral in its own nature, is prohibited under the ſanction only of a civil penalty, the ſums exacted from the tranſgreſſor, like the penalties in a bond for borrowed money, are to be viewed merely as civil debts, and their legal effects to be governed by the ſame rules; Erſkine, book 4. tit. 4. § 4.

Here this principle ſeems peculiarly applicable.—The penalties in queſtion are leviable in Scotland by the ſame forms of diligence which are competent for the recovery of a civil debt. The relaxations, therefore, from the rigour of perſonal execution, it may be juſtly inferred, are the ſame in both caſes. In England, too, where the benefit of the *Ceſſio bonorum*, and of the act of grace, is unknown, the endurance of impriſonments following upon this ſtatute is limited to one, two, or three months. From the omiſſion of a ſimilar proviſion with regard to Scotland, it muſt follow, that the remedies above mentioned are here competent; otherwiſe the ſame tranſgreſſion which in England is attended only with a temporary confinement, would in Scotland be puniſhed by impriſonment for life.

Anſwered: By a variety of deciſions, founded on the correctory nature of the act 1696, and ſupported by analogy from the benefit of the

the *Ceſſio bonorum*, its effects are limited to ſuch confinements alone as ariſe from a priſoner's inability to implement obligations originating *ex contractu*, or *ex quaſi contractu*. In caſes, therefore, where diligence is uſed to enforce the performance of facts in the debtor's power, or where it is the conſequence of an illicit act, whether prohibited by the law of nature, or by municipal laws, the ſituation of parties is the ſame as if the ſtatute had never exiſted; Kilkerran *voce* Priſoner, 5th January 1754, Will *contra* Urquhart; 24th February 1768, Wright *contra* Graham; Bankton, book 4. tit. 40. § 4.; Erſkine, book 4. tit. 3. § 14.

That the preſent caſe is of the latter deſcription, does not ſeem to admit a diſpute. The cauſe of confinement was the tranſgreſſion of a public law, neceſſary for the ſupport of the revenue, and guarded by a penalty not commenſurated to the injury done to the ſtate, but to the obſtinacy of the offender. The action by which the priſoner was purſued is by the ſtatute termed a *proſecution*, the charge brought againſt him an *offence*, the judgment by which he is condemned a *conviction*, and he himſelf an *offender* againſt the law. Nor from the ſubſtitution of the Scots form of perſonal attachment, as beſt underſtood in Scotland, can an intention be preſumed to give delinquents the benefit of the ſtatute 1696, by which the ſtatute under conſideration would be rendered altogether nugatory.

The Lords, conſidering the confinement in queſtion to have ariſen *ex delicto*, were of opinion that it did not fall under the enactment 1696. And it was ſuggeſted, that the proper mode for the priſoner's obtaining relief, was by offering a bill of ſuſpenſion and liberation.

The Lords, therefore, found the application incompetent.

Lord Reporter, *Gardenſton*. Act. *Solicitor-General Murray*. Alt. *Cay*, and
Lawyers for the poor. Clerk, *Home*.

C.

N° XCII.

N° XCII. *February* 13. 1783.

ROBERT MACAULAY, and others,

AGAINST

JOHN ANGUS.

PUBLIC OFFICER. *Circumſtances ſufficient to diſqualify a candidate for the office of a notary-public.*

ANGUS, with a view of practiſing in the city of Glaſgow, made application to the Court for admiſſion into the office of a notary-public. His moral character and his abilities having been certified in the uſual manner, he was, in conſequence of a remit from their Lordſhips, examined by two writers to the ſignet, by whom his proficiency was approved and reported. But when the Court came to give their ſanction to this report, objections to his admiſſibility were urged by Macaulay, and a number of other members of the ſociety of writers in Glaſgow. Theſe were founded on the following circumſtances in his ſituation and character; ſome of which became afterwards the ſubject of proof.

About the age of twenty, Angus entered into the ſervice of a tobacconiſt in Glaſgow. After the death of his maſter, whoſe widow he had married, he carried on the buſineſs on his own account for ſome time, and then turned bankrupt. No diſhoneſty however appeared in his conduct; the compoſition which he paid was 10s. in the pound, beſides granting his bills for a farther payment of 2 s. 6 d. Having again begun buſineſs as before, he became a ſecond time inſolvent; an event which ſeemed to be in part owing to his reſources having been unequal to the payment of thoſe bills.

Angus now, when about twenty-ſeven years of age, placed himſelf as an apprentice with a writer in Glaſgow, and continued to ſerve in that capacity until the expiration of the term agreed on. His wife in the mean time took up the buſineſs of a grocer; and in this undertaking likewiſe a bankruptcy happened. He however, profeſſing himſelf to have no concern with his wife's tranſactions, ſtill followed the occupation of a writer, and after a few years made the application in queſtion for being admitted a notary-public.

The grounds of the *objections* pleaded againſt Angus, from thoſe facts, were four in number: *Firſt*, His repeated bankruptcies: *Second*, His character being ſuſpicious: *Third*, His having ſo long followed a different profeſſion: *Fourth*, His wanting the knowledge requiſite for diſcharging the office he was in ſuit of.

It

It ſeemed, however, to be admitted, that no one of theſe particulars, apart from the reſt, could furniſh an objection ſufficient to diſqualify Angus for becoming a notary-public. But it was urged, that the ſum of the whole was of ſuch magnitude, as to preſent an inſurmountable obſtacle to his admiſſion into an office of ſuch conſiderable public truſt, and which required ſo great an extent of qualification, both in point of morals, and of profeſſional ſkill. To thoſe objections Angus

Anſwered: Firſt, His bankruptcies were not attended with diſhoneſty: *Secondly*, Of his bad character there exiſts not any proof: *Thirdly*, His having, prior to the age of twenty-ſeven, been engaged in a mercantile employment, is not a relevant ground of exception: *Fourthly*, That he poſſeſſed a competent ſhare of the requiſite knowledge, has been found on regular examination, and has been certified in due form.

It was added, That the notion of completing in the above manner a ſum-total of objections, owned to be ſeverally inſufficient, would lead to very looſe and arbitrary, and even to whimſical modes of judging concerning caſes like the preſent; and that the conceſſion itſelf, on which it proceeded, ſeemed fatal to the pleas of the objectors.

The Court, after a hearing in preſence, were of opinion, That the whole circumſtances of the caſe were of ſuch a nature as to ſhow Angus to be an unfit perſon for being intruſted with the office of a notary-public.

The Lords therefore refuſed to authoriſe his admiſſion.

Act. *Ilay Campbell, Cullen, Arch. Campbell.* Alt. *Hen. Erſkine, W. Steuart.*

N. B. When the cauſe was about to be decided, the objectors produced a paper ſaid to have been given in to an inferior court, with this title, *Defences for Jane Seymour* (Angus's wife) *and Company*, and likewiſe certain ſhop-accounts of hers, bearing the ſame addition of *Company* to her name; an appellation, as they contended, which indicated either an equivocal conduct on the part of Angus, in his thus ſeeming to avow, whilſt on other occaſions he diſclaimed connection with his wife's buſineſs; or elſe a deſign to miſlead his creditors into a belief that the ſhop-goods, as being a company concern, were, ſo far, not attachable for his debts.

S.

N° XCIII. *February* 15. 1783.

ANNE MACKAY,

AGAINST

The REPRESENTATIVES of Colonel HUGH MACKAY.

CREDITORS OF A DEFUNCT.—*Act* 1661 *applies to ſubjects heritable* deſtinatione.

INHIBITION—*Whether it extends to ſuch ſubjects.*

ANNE MACKAY, the ſecond wife of William Mackay, was by their contract of marriage entitled to certain proviſions.

Among other funds belonging to William Mackay, were two wadſet-rights, and a bond conceived "in favour of him and his (former) "wife, in conjunct fee and liferent, and of the heirs-male to be pro-"created betwixt them, in fee."

Thoſe wadſets William Mackay diſponed to George, his eldeſt ſon by the prior marriage, to whom, by the conception of the bond, that right likewiſe was to devolve.

Within a few months after the death of William Mackay, George diſponed the wadſet-rights and bond to his immediate younger brother, John.

Poſterior to this conveyance, Anne Mackay ſued theſe ſons of her huſband, as being his repreſentatives, for payment of her proviſions; and, on the dependence of the action, uſed inhibition againſt them both.

Afterwards, John conveyed to Colonel Hugh Mackay, a creditor of his, the wadſet-rights and bond in ſecurity of his debt.

A competition then enſued between Anne Mackay and certain perſons repreſenting Colonel Mackay, the event of which was chiefly to depend on the effects of the conveyance by George to John, and of the inhibition uſed by Anne Mackay againſt them.

Pleaded for Anne Mackay: As the wadſets and the bond, now the ſubjects of competition, are both heritable rights, the laſt, by virtue of its deſtination "to heirs-male," being not leſs ſo than the firſt, the debts of the anceſtor are ſtill preferable upon them to thoſe of the heir, notwithſtanding the conveyance by the latter within a few months of the death of the former. Both come equally within the ſanction of the ſtatute of 1661, cap. 24. which declares, that no "right or diſpoſition made by an apparent heir, ſo far as may pre-"judge his predeceſſor's creditors, ſhall be valid, unleſs it be made "and

" and granted a full year after the defunct's death." As a creditor therefore of William Mackay, the father, the claims of Anne Mackay reſpecting both rights alike, are to be preferred to thoſe of any creditor of his ſons. And her preference has likewiſe been ſecured by inhibition.

Anſwered: *Nomina debitorum* are not the ſubject of inhibition: Nor is the caſe altered from their becoming heritable *deſtinatione*. With reſpect to Mrs Mackay's preference, as a creditor of her huſband, over the creditors of his heirs, the bond being a perſonal right, falls not under act 1661.

The Lord Ordinary reported the cauſe to the Court, who were clearly of opinion, That the ſtatute 1661 applies to heritable ſubjects indiſcriminately, whether they be ſuch *deſtinatione*, or *ſua natura*.

Some of the *Judges* denied the competency of inhibition to affect bonds heritable *deſtinatione* only. The majority, however, appeared to be of a different opinion; though it proved unneceſſary to give a direct judgment on that point, the following being the interlocutor of the Court.

" The Lords, in reſpect the bond for 4000 merks, due by Lord " Reay, was conveyed by George Mackay to his brother John, prior " to the inhibition at the inſtance of Mrs Anne Mackay, repelled the " grounds of preference pleaded by her upon that inhibition; but " found, that as George Mackay diſponed the ſaid bond to his bro- " ther John within five months of his father's death, the ſaid diſpoſi- " tion is not effectual againſt Anne Mackay, who was a creditor to " the father, being contrair to the enactment of the ſecond clauſe of " the ſtatute 1661."

To that judgment, which was brought under review by mutual petitions and anſwers, the Court adhered; with this only variation, that as it had been omitted to mention, that Anne Mackay's preference was effectual on the wadſet, this omiſſion was now ſupplied.

Reporter, *Lord Gardenſton.* Clerk, *Home.* For Mrs Anne Mackay, *Elphinſton.* Alt. *Honyman.*

S.

N° XCIV.

N° XCIV. *February* 18. 1783.

The KIRK-SESSION of DUMFRIES,

AGAINST

The INCORPORATION of SQUAREMEN there.

KIRK-SESSION.—*Right of keeping Mortcloths.*

THE incorporation of ſquaremen in the burgh of Dumfries having been in uſe, from a very remote period, to let out mortcloths for hire, the kirk-ſeſſion of the pariſh, in the year 1781, inſtituted an action for having it found, that they had the ſole and excluſive right of doing ſo. In ſupport of this action they referred to the following deciſions, 10th Auguſt 1756, Turnbull and Kirk-ſeſſion of Kippen *contra* M'Claws, Fac. Coll.; and Kirk-ſeſſion of Kilwinning *contra* Trades, *ib. cit.*

Obſerved on the Bench: The right which the kirk-ſeſſions in Scotland enjoy, of letting out mortcloths for hire, when followed with immemorial poſſeſſion, has been found to eſtabliſh an excluſive right to the emoluments ariſing from this ſort of traffic. Here, however, the defenders having been, beyond the years of preſcription, in the practice of letting out mortcloths, there is no foundation for the preſent action.

The Lords "aſſoilzied the defenders, in reſpect of the long poſſeſſion had by them."

Lord Reporter, *Stoneſield.* Act. *Croſbie.* Alt. *Elphinſton.*
Robertſon, Clerk.

C.

N° XCV.

N° XCV. *February* 22. 1783.

JAMES MURDOCH,

AGAINST

ALEXANDER GORDON.

PATRONAGE. *Whether patronages of Churches came under the general act of Annexation in* 1587.

MR MURDOCH, preacher of the goſpel, obtained from the Crown a preſentation to the pariſh-church of Croſſmichael; a church to the patronage of which Mr Gordon of Culvenan likewiſe laid claim. Of the Crown's right to this patronage a proceſs of declarator was brought, in the name of Mr Murdoch alone; the counſel for his Majeſty, deeming that of Mr Gordon preferable to it, having declined to concur in the action.

Mr Gordon's right was derived from a charter of King James VI. in 1593, containing, among other ſubjects, the patronage in queſtion. This charter, however, being poſterior to the general act of annexation, Mr Murdoch contended, that a previous diſſolution in parliament was neceſſary to render it an effectual grant of the patronage. The point therefore on which the fate of the competition chiefly * depended was, Whether rights of patronage were to be underſtood as comprehended in the property of the Crown thus annexed. The Court having appointed a hearing of the cauſe in preſence, it was

Pleaded for the preſentee of the Crown: The ſtatute of 1587, cap. 29. is thus entitled: "Annexation of the *temporality* of benefices "to the Crown." The term *temporality* here plainly denotes ſuch rights as were held by virtue of the temporal law, that is, the common law of the realm; and ſtands in contradiſtinction to that of *ſpirituality*, by which, prior to the Reformation, the clergy denominated tithes; theſe being as they ſuppoſed, poſſeſſed *jure divino*, independently of any human or temporal appointment. This pretended *jus divinum*, however, having after that event been reprobated as unchriſtian, or abſurd, the conſequence was, that though all the parts of the Popiſh benefices, as *bona vacantia*, had equally devolved to the Crown, yet the act of parliament above mentioned, framed for rendering them its annexed property, was confined to the temporality alone. It being unjuſt to comprehend in like manner their *ſpirituality*,

* There were other topics introduced, which proved immaterial in the cauſe, particularly one reſpecting the effect of a private act of ratification, in the event of patronages being found to have come under the annexation.

the foundation of the right to which had been thus ſhaken, this was reſerved from the annexation, ſtill alienable, and open to future diſquiſition; though perhaps an exception is to be made of the teinds of prelacies and of kirk-lands, agreeably to the ſtatute of 1593, cap. 192. But, under the denomination of *ſpirituality*, could not be comprehended rights of preſentation, which no churchman ever imagined to belong to the church *jure divino*. Among the other temporal ſubjects therefore which fell under the annexation, patronages of churches are undoubtedly to be claſſed. Indeed the power of preſenting was not the only temporal right which belonged to patrons; they were likewiſe entitled to enjoy the lands, and other temporal property of benefices, during their vacancy.

The ſubſequent ſtatutes accordingly refer to the annexation of patronages. Thus that of 1606, cap. 2. concerning the reſtitution of the eſtates of biſhops againſt the general act of annexation, ſpecially mentions patronages among the ſubjects annexed. In the ſtatute likewiſe of 1633, cap. 9. entitled, *The King's general revocation*, and which recalled all alienations of benefices that had been annexed to the Crown, " patronages of kirks" are expreſsly denominated as ſuch; and in the act, the 12th of the ſame year, a ſimilar expreſſion is uſed thus: " Patronages and benefices formerly belonging to the kirk, and " ſince annexed to the Crown." In a variety of inſtances too of acts of diſſolution, framed for the purpoſe of erecting new benefices, patronages are found expreſsly diſſolved; ſuch as that in favour of the biſhop of Edinburgh in 1633, and that which appeared in the lately decided caſe of the crown and the Earl of Haddington relative to the pariſh of Lennel. The opinions of lawyers correſpond to theſe proofs. Thus Lord Stair, b. 2. tit. 8. § 35. ſays, " There are patronages " which by act of parliament are annexed to the Crown, either ex- " preſsly, or when baronies, lordſhips, or benefices, are annexed." And the obſervation is repeated by Mr Erſkine, b. 1. tit. 5. § 10.

Anſwered: To create a permanent addition to the revenues of the Crown, which by the profuſion of our princes had been greatly diminiſhed, was undoubtedly the object of the ſtatute of 1587, as of all the other acts of annexation; and accordingly in the preamble of that ſtatute it is expreſsly ſo declared. But as by the acceſſion of mere rights of patronage the royal treaſure could never be increaſed, it was ſurely not to be expected that theſe would be found in the property annexed, and which too is denominated the *temporality* of benefices; an appellation confined to ſubjects of revenue, excluſively of patronages, and all other unproductive rights; as at the ſame time it likewiſe diſtinguiſhed that revenue which aroſe from lands and other temporal ſources, in oppoſition to teinds claimed by the church *jure divino*. In the minute and prolix enumeration accordingly of the ſubjects of annexation which the enacting part of the ſtatute contains, not a hint concerning patronages is to be diſcovered; for though it deſcends even to trifling particulars, ſtill they are of a nature to afford a lucrative product.

That,

That, in fact, patronages were not ſo annexed, is farther apparent from ſeveral poſterior ſtatutes. Thus the act of parliament of 1593, cap. 172. declares the conſent of beneficed perſons alone, without the aid of diſſolution, ſufficient to give validity to alienations by the Crown, of rights of patronage. For the ſame reaſon, the act of 1617, cap. 2. excepts from the patrimonies thereby reſtored to chapters of cathedral churches, thoſe patronages which ſince the annexation had been alienated by his Majeſty; an abſurd proviſion ſurely, if they had been regarded as part of the Crown's annexed and unalienable property. Nor is the ſtatute of revocation in 1633 inconſiſtent with theſe enactments; for it relates not to patronages in general, but to a few particular inſtances of annexation *per expreſſum*, which it belongs not to the preſent argument to controvert; as indeed they rather fortify it, by ſhowing the neceſſity of an expreſs enactment on the ſubject. This doctrine is confirmed by the authority of Sir Thomas Hope, tit. *Of Kirks and Benefices*, § 4. 5.; and by that of Lord Bankton, b. 2. tit. 8. § 90.; while the above quotation from Lord Stair is confined to thoſe ſpecial caſes, and to the annexation of baronies including patronages.

In truth, the notion itſelf of the annexation of patronages would perhaps have never occurred, but for the zeal of Sir George Mackenzie in ſtrengthening the hands of his Sovereign, againſt the influence of thoſe whom he calls "ſchiſmatic private patrons;" perſons, in the diſaſtrous times preceding the Revolution, attached to the cauſe of that civil and religious freedom which was eſtabliſhed at that æra. In his obſervations on the general act of annexation in 1587, he mentions the caſe of Stewart *contra* the Laird of Waterſtoun, in which, he ſays, the queſtion was agitated, but not decided. As however he aſſigns no reaſon for this, it may be fairly preſumed to have been no other than his own foreſight of an event oppoſite to his wiſhes. From that period to the preſent time, except in one inſtance, the idea has never been revived; a caſe, that of Donaldſon of Kinnairdie *contra* the Officers of State, January 8. 1755, which furniſhes a direct precedent for the preſent; as it was there decided by the Court, that patronages did not fall under the acts of annexation. Lord Kames's Select Deciſions, N° 72.

Replied: Though the opinion of the learned Reporter of the laſt-mentioned deciſion ſeems adverſe to the annexation of patronages, yet, from inſpection of the papers in that cauſe, it appears not to have been determined on that principle; concerning which, from the number of ſpecialities in the caſe, it was unneceſſary to give judgment.

The majority of the Court, upon the grounds above ſtated, were of opinion, that church-patronages were not included under the general act of annexation; and therefore that any ſubſequent alienation of them by the Crown could not require diſſolution in parliament to render it effectual. So that the charter founded on by Mr Gordon was, notwithſtanding the objection of there having been no previous diſſolution

lution in parliament, ſuſtained as a valid grant of the patronage in queſtion.

The Lord Ordinary had found, "That the defender Alexander "Gordon had the preferable right to the patronage in queſtion;" and

"The Court having heard parties procurators in their own pre- "ſence, adhered to the interlocutor of the Lord Ordinary."

A reclaiming petition againſt this judgment, to which an additional one was joined, were, on being adviſed with anſwers, both refuſed.

Lord Ordinary, *Ankerville.* Clerk, *Orme.* Act. *Ilay Campbell, Croſbie.* Alt. *Blair, R. Dundas.*

S.

N° XCVI. *February* 25. 1783.

CHARLES GORDON,

AGAINST

JOHN BURNET.

REMOVING.—*What* induciæ *are requiſite in a ſummons of removing from fiſhings.*

THE ſeaſon of fiſhing ſalmon commences at Andreſmas, or the 30th of November yearly, which is therefore the uſual term of entry to poſſeſſions of this kind.

Mr Gordon, proprietor of certain fiſhings in the river Dee, executed a ſummons of removing againſt Burnet his tenant more than forty days preceding this term.

Pleaded in defence: The ſame *induciæ* are requiſite in a ſummons of removing on the act of ſederunt 1756, as in a precept of warning upon the ſtatute 1555. And as this ſtatute ſpecially comprehends fiſhings, the execution in this inſtance ought to have taken place forty days before the Whitſunday preceding the iſh.

Anſwered: The objects of the enactment 1555 were labourers of the ground, and the purpoſe of it, that theſe might have a reaſonable time to provide themſelves in other farms, which were then uniformly let at Whitſunday each year. Hence, although the ſtatute comprehends not only lands and fiſhings, but alſo *all poſſeſſions whatſoever*, it has in

in practice been limited to rural tenements alone; and in collieries, ſaltpans, houſes poſſeſſed by artificers, or within burgh, and in manſion-houſes and fortalices in the country when not connected with a farm, all that is neceſſary, is an intimation given a reaſonable time before the term at which theſe tenements are uſually let; Stair, b. 2. tit. 9. § 34. Durie, 18th December 1630, Ramſay *contra* Lord Conheath; 19th November 1758, Lundin *contra* Hamilton; 11th March 1756, Duke of Queenſberry *contra* Telfer; 15th December 1767, Wauchope of Niddery *contra* Hope.

The mention of fiſhings, therefore, among the ſubjects where warning is required, muſt have occurred *per incuriam*, or muſt be reſtricted to thoſe which are let together with a rural tenement. Accordingly Lord Bankton, book 2. tit. 9. § 53. in expreſs words excepts fiſhings from this act.

The Lord Ordinary ſuſtained the defences; and the purſuer having reclaimed to the Court, the Lords refuſed the petition without anſwers.

Lord Ordinary, *Juſtice-Clerk.* Act. *George Fergusſon.*

C.

N° XCVII. *February* 25. 1783.

Sir THOMAS DUNDAS,

AGAINST

THOMAS DUNDAS, and others.

WRIT. *Whether a ſettlement of a landed eſtate may be effectually revoked by a teſtamentary deed.*

Whether it may be ſo revoked by a deed deſtitute of the ſtatutory requiſites; but executed abroad agreeably to the ſolennia loci.

SIR LAURENCE DUNDAS, on occaſion of the marriage of his ſon, became bound, by the marriage-articles, to execute in his favour a diſpoſition of his eſtates in Scotland, " for his liferent-uſe of the " rents, profits, and iſſues of them after the death of Sir Laurence; " and in truſt *quoad* the fee and property of the lands and eſtate, for " the uſe and behoof of the ſons of the ſaid marriage, and their iſſue-" male;" but ſubject to certain reſervations, and in particular one of "a power and faculty to deſtinate and carry on the line of ſucceſ-" ſion, and thereby to impoſe ſuch conditions and limitations on " them, and other perſons called to the ſucceſſion, as he ſhould judge " proper, and might be effectual to diſable them from altering the " courſe of ſucceſſion."

That intended diſpoſition, though drawn up, was never executed. But afterwards, when he had acquired other lands in Scotland, Sir Laurence executed a deed of entail of the whole of his Scottiſh eſtates,

" in favour of his ſon and his children, of his brother, and of various " other heirs called in ſubſtitution;" to which deed he annexed the following proviſo: " That it ſhall be lawful to me at any time of " my life, and even upon deathbed, to revoke, alter, or change this " preſent tailzie at my pleaſure, in ſo far as the ſame ſhall be conſiſt- " ent with the marriage-articles above mentioned."

About eleven years after the date of the entail, Sir Laurence, then reſiding at London, made his latter will, in the Engliſh form, as follows: " I do give, deviſe and bequeath, unto my dear ſon, Thomas " Dundas, all my real eſtate in England, Ireland, and Scotland, as " alſo in the iſland of Dominica in the Weſt Indies, and elſewhere, " not included in the ſettlement made on his marriage, and all my " perſonal property of every nature or kind ſoever, to hold to him, " his heirs, executors, adminiſtrators, and aſſigns, for ever; but " charged and chargeable with one annuity or yearly ſum of L. 2400, " which I hereby give and bequeath to my dear wife." (Here follow ſeveral other legacies). " And I do hereby revoke all former and " other wills by me heretofore made, and do conſtitute and appoint " my dear ſon my ſole executor of this my laſt will."

After the death of Sir Laurence Dundas, his ſon, Sir Thomas brought againſt the ſubſtitute heirs of entail an action of reduction and declarator, for the purpoſe of having that ſettlement reduced and annulled, and the whole entailed eſtates above mentioned, ſo far as not contained in the marriage-articles, declared to belong to him in fee-ſimple. The action was chiefly founded on the above teſtamentary deed, as containing a revocation of the tailzie, if not a new deviſe of the ſubjects of it.

Pleaded for the defenders: Deeds of a teſtamentary form, being underſtood in law as executed upon deathbed, are not competent for the tranſmiſſion of heritage; Burgeſs *contra* Stanton, 13th January 1764. The deviſe, therefore, contained in the former part of the will in queſtion, is clearly ineffectual as a conveyance or ſettlement of the lands ſituated in this country; of which, indeed, the portion comprehended in the marriage-articles is therein expreſsly excepted: And ſurely that non-ſubſiſting deviſe muſt be equally unavailing as an implied revocation of the above mentioned entail; Lord Bankton, b. 3. tit. 4. § 49. On the ſame principle, the after part of the will, that which recals " former wills," in whatever manner interpreted, is of as little effect as the preceding; the circumſtances occaſioning the incompetency of the one for creating a new ſettlement, cauſing not leſs evidently that of the other for the revoking or annulling of a valid ſettlement already eſtabliſhed; nor can any authority be produced to countenance a diſtinction between the two caſes. Beſides, the ſole object of ſuch a revocation being to make way for a new deſtination, this being precluded, that muſt fall of courſe. But, in truth, the revocation contained in the will is altogether out of the queſtion; that being merely " of all former *wills*;" an appellation under which a deed of entail is not to be comprehended. To indicate ſuch an intention, the term " ſettlements," or the like, would have been employed

ployed in the place of "wills," which is a word plainly not leſs applicable even to a bill or a bond than to an entail. In the ſame manner, it may be obſerved with regard to the deviſe itſelf, which is conceived in favour of the purſuer, and of "his heirs and aſſigns," that as this phraſe is of a ſignification which admits of being accommodated to antecedent titles, or other peculiar circumſtances, ſo it may here be underſtood to denote the heirs of entail themſelves; and thus the ſuppoſed incompatibility of the two deeds will be obviated. Should it, however, be aſked, for what end then was the will framed? The anſwer would be, that it was meant to beſtow on the wife of the teſtator her large annuity, and on the legatees their ſeveral bequeſts; all which proviſions, conſtituting a new charge againſt the purſuer and the eſtate, it was natural enough to mention or repeat the deſtination in his favour.

But the teſtamentary nature of the deed in queſtion is not its only imperfection. It is deſtitute likewiſe of thoſe ſolemnities which, by the ſtatute-law of Scotland, are required to give authenticity to documents reſpecting conſiderable property; or, in the ſtatutory language, *deeds of importance*; among which this muſt hold a high rank. Though not holograph of Sir Laurence Dundas, it expreſſes neither the name and deſignation of the writer, nor thoſe of the witneſſes; ſo that it is to be regarded as null and void. This objection is not obviated by the *will's* being conformable to the *ſolennia loci* of England, where it was framed; ſince it relates to heritable ſubjects ſituated in Scotland. In perſonal obligations and contracts, indeed, or thoſe relative to moveable ſubjects, which have not a permanent *ſitus*, the *lex loci contractus* is the governing rule; notwithſtanding that ſuch deeds may eventually become means of impoſing burdens on landed property; the reſult perhaps rather of neceſſity than of *comitas*, ſince at the time of contracting, it may be impoſſible to foreſee in what country, from the debtor's withdrawing himſelf and his moveables thither, execution of his obligations muſt be demanded. But of deeds, on the other hand, which directly and originally relate to landed property, the courts of the country where it is ſituated ought to judge entirely according to their own laws; denying execution to all thoſe which are not authenticated by the forms which theſe laws preſcribe. This is the doctrine, not only of our law, but of that of England, on which laſt the purſuer grounds his action; Erſkine, b. 3. tit. 2. § 40.; Stewart's Anſwers to Dirleton's Doubts, *voce* Strangers; Lord Kames, of the juriſdiction of the Court of Seſſion, Dict. of Deciſ. *voce* Foreign, February 1729, Earl of Dalkeith; Williams's Reports, vol. 2. p. 294; Burrow's Reports, p. 1079. Nor on this head, more than in the preceding part of the argument, is there any juſt diſtinction to be made between deeds of themſelves conſtituting new ſettlements, and thoſe which import the revocation of antecedent deſtinations; and therefore none ſuch is recogniſed either in the ſtatute or the common law of Scotland; where, on the contrary, this rule univerſally obtains: *Unumquodque eodem modo diſſolvitur quo colligatum eſt.* And certainly no reaſon for thus diſtinguiſhing in this caſe can ariſe from the circumſtance of the deed's being executed in a foreign country,

country, as England is reſpecting the preſent queſtion. It is true, nevertheleſs, that to expreſs the ſimple purpoſe of revocation, no technical terms or phraſes are requiſite; but from hence it does by no means follow, that no peculiar forms are neceſſary legally to conſtitute ſuch a document. The will or intention of making a ſettlement may be as ſimply expreſſed, and with as few technical terms, as that of revoking one previouſly executed; and yet a *jus ad rem*, will be thereby created, which, by certain known proceſſes of law, may be perfected into a complete feudal right. But as in the latter caſe the will muſt be authenticated by the proper legal forms, ſo in the former theſe are not leſs indiſpenſably requiſite.

Anſwered for the purſuer: That deeds directly purporting the tranſmiſſion, or even the burdening of landed-property, muſt be executed agreeably to the forms or ſolemnities preſcribed by municipal laws, is a point not to be controverted. It hardly, however, belongs to the preſent queſtion, which, ſince the purſuer has little occaſion to inſiſt on the validity of the deviſe as ſuch, reſpects chiefly the revocation of a prior gratuitous ſettlement ſtill remaining under the power of the granter. As the granter of ſuch a deed may himſelf at any time cancel or deſtroy it, he can undoubtedly authoriſe another perſon ſo to do. In particular this authority may be given by any writing expreſſive of his intention; and ſurely to aſcertain the authenticity of that writing, nothing more is neceſſary than its being of the form requiſite to render it probative by the law of the country where it is executed. Nor ſhould it appear at all ſingular, that a writing ſo framed were ſufficient for carrying into effect the deſign of revoking a prior ſettlement; ſeeing ſuch a writing would be not leſs effectual for the purpoſe of creating a new and valid deſtination or conveyance of a landed eſtate. For might not ſufficient authority for that effect be given by a power of attorney, drawn up in conformity to the law of the country where at the time the granter reſided? For example, would not infeftment taken in virtue of an Engliſh power of attorney be valid and effectual? If ſo, it ought not to ſeem ſtrange that a ſimilar writing ſhould confer the authority for annulling a gratuitous ſettlement ſtill under the granter's power. The will in queſtion, conſidered as a deed of revocation, is preciſely of ſuch a nature. Being executed according to the forms of England, where it was framed, it contains a declaration revoking a gratuitous ſettlement, the power of doing which at any time the granter had therein reſerved to himſelf. The expreſſions of will in the two caſes are not to be diſtinguiſhed from each other. Hence it is evident how totally miſapplied by the defenders is the maxim, that *unumquodque eodem modo diſſolvitur quo colligatum eſt;* a rule indeed which in our law admits ſeveral exceptions reſpecting heritage.

An objection has been likewiſe made to the teſtamentary form of the deed in queſtion. Such a deed being evidently inept for the conveyance, it was ſaid, muſt by conſequence be equally ineffectual as a revocation of a prior ſettlement, of heritage. In this argument, however, the peculiar nature of a revocable deed, ſtill in the cuſtody and

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at the abſolute diſpoſal of the granter, is totally overlooked; and therefore the concluſion at leaſt is erroneous, although the premiſes be true. But even theſe may be juſtly queſtioned. For it is only heirs who are ſecured againſt, or entitled to challenge alienations *in lecto*; and in this caſe the purſuer, who is heir, approves of the teſtamentary deed. He means not, however, to diſpute, that heirs of tailzie and proviſion, as well as of line, may in general plead that exception; but the defenders are precluded from it by the faculty of revocation expreſsly reſerved in the tailzie, which is their ſole title. If they are to claim under that qualified deed, they ſurely cannot reject its qualities; Dirleton, 7th June 1676, Dict. of Deciſ. vol. 3. *voce* Deathbed, Dec. 11. 1751, Simpſon *contra* Barclay. In the laſt quoted caſe, a teſtamentary writing was not only held ſufficient for the revocation of a prior revocable ſettlement of heritage, but likewiſe for the conveyance, of at leaſt the half of it, in favour of another perſon than the heir at law.

With regard to the criticiſm of the defenders on the words "former wills," the expreſſion uſed in the deed in queſtion, that phraſe is undoubtedly to be interpreted agreeably to the language of the deed itſelf; and as "will" there denotes a writing conveying heritage, ſo the ſame meaning is throughout to be adopted. Nor is any thing elſe than a like reference to the latter will itſelf neceſſary, in order to furniſh an anſwer to the obſervation, that becauſe the term "heirs and aſſigns" is of pliable ſignification, it ſhould be there conſtrued as denoting the heirs of entail; the defenders thus attempting to wreſt in their own favour the conception of a deed, evidently deſigned and executed in direct oppoſition to them.

Replied: In the caſe of Simpſon *contra* Barclay, as it does not appear but that the will was holograph of Barclay, that deciſion can be of no authority in ſupport of the effect of a deed deſtitute of the legal ſolemnities.

The Court ſeemed to conſider the deviſe contained in the firſt part of the will to be quite ineffectual; but were generally of opinion, that the ſubſequent part of it imported a valid revocation of the entail, in virtue of the faculty therein reſerved; any ſimple expreſſion of will in a writing probative by the *lex loci*, being held ſufficient for that purpoſe.

The interlocutor of the Court, pronounced on the report of the Lord Ordinary, was as follows: "The Lords find, That the deed of entail "libelled on is effectually revoked by the deed executed by Sir Lau- "rence Dundas upon the 14th February 1779; and therefore find, "That the purſuer, and the ſons of his (ſaid) marriage, are entitled "to hold, poſſeſs, and enjoy the lands ſettled upon them in the mar- "riage-articles libelled on, and that in terms of the obligation there- "in contained; and alſo that the ſaid purſuer is entitled to hold, poſ- "ſeſs, and enjoy the whole lands and heritable ſubjects ſpecified in "the ſaid deed of tailzie, and not contained in the ſaid marriage-

" articles, and that, in fee ſimple, as heir of line in general ſerved " and retoured to his father, as libelled, and to make up and expede " his titles in that character accordingly."

The defenders reclaimed againſt this judgment; but, on adviſing their petition, with the anſwers, the Court adhered to it.

Lord Reporter, *Gardenſton.* Act. *Lord Advocate (H. Dundas), Wight, Ilay Campbell.*
Alt. *Maclaurin, Blair, A. Abercromby, R. Dundas.* Clerk, *Orme.*

Reversed on appeal 21 May 1783

S.

N° XCVIII. *February* 25. 1783.

MARGARET JOHNSTON, and others,

AGAINST

WILLIAM DOBIE, and others.

HERITABLE and MOVEABLE.—*Whether window-frames, doors, and the like, found within a houſe when a-building, but not yet fixed to their proper places, fall under the heritable or moveable ſucceſſion.*

JAMES JOHNSTON executed, in favour of Margaret Johnſton, his wife, and of certain other perſons, a diſpoſition of the whole eſtate heritable and moveable, that ſhould belong to him at the time of his death. But as he lived only a few days after the date of this deed, it was, at the inſtance of his heir at law, reduced *ex capite lecti* " ſo far " as reſpected the heritable ſubjects thereby conveyed." When Mr Johnſton died, a houſe was erecting for him, in which a ſet of doors and windows, and other articles, were then lying, in order to be fixed to their proper places in the building. A queſtion thus aroſe in regard to them between the heir at law and the diſponees; the former contending, that along with the houſe itſelf they had fallen under the heritable ſucceſſion; and the latter claiming them as moveable ſubjects.

Pleaded for the diſponees: A ſubject, it is admitted, in its nature moveable, may be rendered heritable by the deſtination of the proprietor, whether expreſſed in words, or *rebus et factis*. As, however, for this end, words clear and unequivocal muſt, on the one hand, be employed; ſo, on the other, the acts whence the deſign is to be inferred, muſt be ſuch as to preclude ambiguity. Hence, though a man ſhould have pitched on a certain piece of ground for the purpoſe of raiſing an edifice, ſhould have provided the materials for the undertaking, and ſhould have even collected and conveyed them to the deſtined ſpot; ſo that, it muſt be acknowledged, no purpoſe could be marked

marked with ſtronger probability, than that of a building conſequent on thoſe preparations, or of the union of thoſe moveables with the immoveable ſoil; yet ſtill, until the building ſhould have commenced, and the union been actually conſtituted, the moveable nature of the materials would remain unchanged. Such is the doctrine of our law; Erſkine, b. 2. tit. 2. § 14. as it is alſo of that of England; Viner's Abridgment, *voce* Heir.

In the preſent caſe, it was to be ſure highly probable that Mr Johnſton had deſtined the doors, the window-frames, and the other moveables in queſtion, to be united with, and to become part of his propoſed tenement; and a like probability would have attended his purchaſing in their rudeſt ſtate the materials out of which they were formed; yet, as their fixture had not been accompliſhed, they were ſtill no parts of the building, nor more joined to it by an actual union, than when in the ſtate of unwrought timber or metal. Notwithſtanding, therefore, any probability to the contrary, there was here no certainty of deſtination, and conſequently no effectual change of the nature of the ſubjects from moveable to heritable.

Anſwered: As it has been admitted, on the one hand, that a proprietor *deſtinatione*, expreſſed either by word or deed, may convert a moveable into an heritable ſubject; ſo it is now, on the other hand, granted, that not merely a probability, but a reaſonable meaſure of certainty of deſign, ariſing from the acts of the proprietor, is required to effectuate that change. The doctrine of Mr Erſkine is accordingly ſubſcribed to. But though in the caſe ſuppoſed by that author, the mere collecting of rude materials for building would not infer an alteration of their moveable nature, yet no ſoonnr ſhould the building have been begun, than the change muſt have inſtantly taken place; the probability of intention thus riſing to certainty; Stewart's Anſwers to Dirleton's Doubts, tit. Executry. In like manner, had the timber, iron, or braſs, which compoſe the doors and windows in queſtion, remained, though in the poſſeſſion of Mr Johnſton, in their rude, unwrought, or unfiniſhed ſtate, whatever high degree of probability of deſign they might have evinced, their nature, it may be allowed, would not have been altered; but by their having been completely formed, fitted, and adjuſted to their peculiar places in a particular tenement, the abſolute deſtination of them for the uſe of that tenement becomes unqueſtionably aſcertained. The *animus deſtinandi* is then as fully expreſſed as it poſſibly can be *rebus et factis*.

Some of the *Judges* ſeemed to be of opinion, that even the ſimple collecting of materials for building might often ſufficiently denote the *animus deſtinandi* of the proprietor, ſo as to render them heritable. Others appeared to admit no other rule but the then actual ſtate of the ſubjects. The opinion of the majority was, that in caſes like the preſent, where the will of the proprietor, ſo ſtrongly marked, is actually carrying into execution by overt acts, ſuch *animus* ſhould have full effect.

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The Lord Ordinary had "found, That the articles of unfixed work "were to be conſidered as parts and pertinents of the houſe, and "that the ſame do fall and belong to the heirs at law."

The judgement of the Court was: "To find that the articles of "unfixed work deſtined for the houſe fall to the heir, and not "to the executor, and in ſo far adhere to the interlocutor of the "Lord Ordinary."

In a reclaiming petition it was farther argued, that as Mr Johnſton could undoubtedly have effectually alienated *in lecto* the ſubjects in queſtion, as being, at any rate, heritable *deſtinatione* only; ſo in fact, his diſpoſition being reduced as to the proper heritage alone, ought, with reſpect to them, to be underſtood as ſtill ſubſiſting. But this petition was refuſed without anſwers.

Lord Ordinary, *Alva.* Alt. *R. Dundas.* For Margaret Johnſton, *Henry Erſkine, Mortbland.* Clerk, *Home.*

S.

N° XCIX. *February* 26. 1783.

JOHN HALKERSTON,

AGAINST

ALEXANDER LINDSAY.

PROOF.—*Oath of a bankrupt.*

HALKERSTON, as factor on the ſequeſtrated eſtate of Mr Blackwood, having inſtituted an action againſt Lindſay for the balance of an atteſted account, the defender endeavoured, from a variety of circumſtances, to ſhew that there was a miſtake in the account, which he offered to aſcertain by Mr Blackwood's oath.

The Lord Ordinary refuſed this reference to oath, "in reſpect that "the action was brought, not at the inſtance of the bankrupt, "but at the inſtance of the factor for his creditors."

Againſt this judgment the defender applied to the Court by reclaiming petition.

Obſerved on the bench: A purſuer cannot eſtabliſh a debt by the oath of a defender who is a bankrupt. The caſe, however, is ſomewhat

what different where the bankrupt or his creditors are purſuers. Here, though the bankrupt's oath, which is no longer that of a party, will not eſtabliſh a defence otherwiſe capable of proof in that manner, it may, together with other adminicles, afford ſufficient grounds for a judge to aſſoilzie the defender.

The Lords remitted the cauſe to the Lord Ordinary, in order that the bankrupt might be examined.

Lord Ordinary, *Kennet.* For the petitioner, *Abercromby.*

C.

N° C. *February* 26. 1783.

JOHN BLOUNT,

AGAINST

JOHN NICOLSON.

PASSIVE TITLE,—*Whether inferred, univerſally, by entering heir* more burgi,—*or by* bona fide *diſponing the heritage to truſtees for the predeceſſor's creditors.*

BLOUNT was creditor to the father of Nicolſon, who died the proprietor of a tenement in the town of Dumfries. In this tenement Nicolſon was cognoſced heir to his father by the magiſtrates of the town *more burgi.* He afterwards diſponed the ſubjects to certain perſons, as truſtees for his father's creditors; having done ſo by the direction of a meeting of theſe creditors.

Blount then inſtituted an action on the paſſive titles, againſt him as having entered heir *more burgi*, and likewiſe as having granted the diſpoſition above mentioned.

Pleaded for the defender: *Firſt*, By entering *more burgi* heir to his father in a ſpecial ſubject only, he is not univerſally liable for the debts of the predeceſſor, but only *in valorem*, in the ſame manner as if he had been an heir of proviſion. *Secondly*, The diſpoſition was *bona fide* granted at the deſire, and for the benefit of creditors, and ought not to infer to him the penal conſequence of a paſſive title.

Anſwered: There is no diſtinction known in law as to the extent of repreſentation between entering heir *more burgi* and ſervice in the more regular and formal manner. If an heir wiſhes not to repreſent

univerſally, he may reſort to the *beneficium inventarii* introduced by the ſtatute of 1695, c. 24. That is the proper and only reſource in ſuch a caſe; and they who without recurring to it chuſe to take upon themſelves the general character of heirs, ſhould not pretend to decline an univerſal repreſentation. With reſpect to the diſpoſition, as it would be clearly of evil conſequence to creditors, if an heir, without ſubjecting himſelf to the debts of his predeceſſor, were at liberty to convey his predeceſſor's ſubjects to any perſon whom he might think proper to nominate in the capacity of truſtee; ſo that conveyance ought to infer a paſſive title; Dict. of Deciſ. vol. 2. p. 31. vol. 3. p. 268.

This queſtion having been reported to the Court by the Lord Ordinary, the "Lords, in reſpect the only paſſive title acknowledged by "the defender was that of being cognoſced heir to his father *more* "*burgi* in a tenement in Dumfries, which he conveyed to truſtees for "behoof of his father's creditors, ſuſtained the defence."

Lord Reporter, *Braxfield.* Act. *Maclaurin.* Alt. *Corbet.*
Clerk, Menzies.

S.

N° CI. *February* 27. 1783.

GEORGE MURDOCH,

AGAINST

ALEXANDER DUNBAR.

PUBLIC POLICE—*as to a tradeſman's ſign-board, affixed to the wall of another perſon's houſe.*

MURDOCH, a baker in the town of Nairn, having, as had been ſometimes done by others formerly, affixed his ſign-board to the wall of a houſe, ſituated over the entry to a public lane, in which his bakehouſe ſtood, and poſſeſſed by Dunbar, the latter, diſpleaſed at the circumſtance, without obtaining any public authority, took it down, and carried it into his own houſe. The magiſtrates, in conſequence of a complaint againſt him preferred by Murdoch, beſides ordering him to replace the ſign-board on the wall, impoſed a fine of 20s. on him for the uſe of the public, and another of the ſame amount for that of the private party.

Of this judgment Dunbar preſented a bill of ſuſpenſion, which was refuſed by the Lord Ordinary on the bills.

Dunbar reclaimed to the Court, who, on adviſing his petition with anſwers,

anſwers, adhered to the Lord Ordinary's judgment; and a ſecond reclaiming petition for him was refuſed without anſwers.

Lord Ordinary, *Monboddo.* For Dunbar, *Henry Erſkine.* Alt. *Elphinſton.*

S.

N° CII. *February* 28. 1783.

JOHN PATERSON, and others,

AGAINST

The MAGISTRATES and TOWN-COUNCIL of Stirling, and the Corporation of WEAVERS in that borough.

BOROUGH-ROYAL.—JURISDICTION—*of the Court of Seſſion interpoſed in changing the hour and other circumſtances of the public market of a royal borough, in oppoſition to the regulations already eſtabliſhed by the council of the borough.*

BY very ancient grants from the Crown, the town of Stirling poſſeſſes the right of holding weekly markets. For rendering this right effectual with reſpect to the ſelling and buying of yarn, the magiſtrates and town-council, in 1687, and again in 1703, enacted, "That unfree and country weavers ſhould not be permitted to buy "any linen or woollen yarn to be brought to the borough for ſale, ex- "cept upon the public market-place, and after eleven o'clock fore- "noon each market-day."

In 1715, the country-weavers, in a proceſs of reduction of theſe acts, obtained a decree of the Court of Seſſion in their favour, changing the hour of the market from *eleven* o'clock to *nine* in the morning.

In 1777, Paterſon, and others of the country-weavers of Stirlingſhire, inſtituted an action of reduction of that decree; in which they inſiſted for the unreſtrained freedom of buying yarn in the market, each market-day at any hour of the day, and likewiſe demanded that the burgeſſes and inhabitants, as well as other perſons, ſhould be prohibited from purchaſing yarn except in open market. The borough, at that period, having been disfranchiſed, the parties called as defenders were certain temporary managers of the community, together with the corporation of weavers.

On report of the Lord Ordinary, the Court pronounced the following interlocutor. "The Lords find, That the public yarn-market of "the borough of Stirling ſhall, from the 15th day of April to the "15th day of Auguſt yearly, begin and open at the hour of ſeven in "the morning; and from the 15th day of Auguſt to the 15th day of "April

" April yearly, at the hour of nine in the morning; and in time co-
" ming prohibited and diſcharged all the lieges, freemen as well
" as others, from purchaſing yarn on market-days, but upon the
" public market-place, after the market is begun and opened, as a-
" foreſaid, and not before; and decerned and declared accordingly."

The cauſe having been appealed by the defenders to the Houſe of Lords, was by that high Court remitted to the Court of Seſſion, on purpoſe, that when the borough ſhould be reſtored to its privileges, the proper magiſtrates might be cited as parties. On the conſequent renewal of the action, it was

Pleaded for the defenders: By royal grants this community has obtained the right of holding markets; for effectuating which privilege they are entitled to enact by-laws and regulations. Immemorial uſage and poſſeſſion have placed that authority beyond the reach of challenge; and thus a right of property has been eſtabliſhed, not to be violated from any notions of expediency, however urgent. A corporation ſurely, not leſs than an individual, may acquire a right; nor is there in the nature of that in queſtion any thing to hinder its acquiſition. If it be a reſtraint upon commerce, it is not more ſo than what is occaſioned by various privileges beſtowed both on individuals and on corporate bodies; Falconer, January 14. 1747, Corporation of Mary's Chapel *contra* Kelly; Lord Kames's Select Deciſions, N° 118. Should it be objected, that the powers of the Court are as ample now as they were in 1715 when they decreed an alteration in this matter, that indeed were not to be denied; but if in any caſe an unconſtitutional authority has been uſurped, it ought not to be followed as a precedent.

Anſwered: The grants or charters founded upon by the defenders authoriſe not in any degree the arbitrary privilege which they now claim. Nor, though it be admitted that they have, independently, a right of framing by-laws and rules for the government of the market in queſtion, will it follow that any ſpecifical ordinance thus introduced can acquire by lapſe of time the ſtability of a right of property ſecured by poſſeſſion, or by preſcription. Adapted to the exigence of times and occaſions, ſuch regulations, from their very nature, can never be permanent, but muſt ſuffer change, according as the manners, the cuſtoms, or the ideas of mankind vary. Not the length of the period during which a political inſtitution has ſubſiſted, but the expediency and benefit of the meaſure itſelf alone, are the ground of its ſtability. The long duration of a grievance is a reaſon for bringing the more ſpeedy relief. Indeed the evil againſt which the purſuers contend is one that the legiſlature has already provided redreſs of. It is that of foreſtalling markets; for the object of the defenders, is to buy up the beſt part of the commodity in queſtion before the market be open for the purſuers; a proceeding contrary to law; *Leges Burgorum, cap.* 14. act 21. parl. 4. James V.; Act 148. parl. 12. James VI.

The

The Court conſidered themſelves as empowered to decree ſuch alterations in the ſtate of this market as ſeemed ſuited to the circumſtances of the caſe. They now adopted their former interlocutor, ſettling the hour of market, and prohibiting, without any exemption whatever, the buying of yarn, except in the market place.

Lord Reporter, *Weſthall.* Act. *Henry Erſkine.* Alt. *A. Abercromby.*
Clerk, *Home.*

S.

N° CIII. *March* 1. 1783.

Mrs DALRYMPLE of Orangefield, and JAMES DALRYMPLE, her eldeſt Son,

AGAINST

The Counteſs of GLENCAIRN, and others.

TAILZIE.—*Entail where the limitations affected only the* nominatim *ſubſtitutes.*

BY the terms of the entail executed by Governor Macrae, of his eſtates in the county of Ayr, the limitations, which were guarded by the uſual prohibitory, irritant, and reſolutive clauſes, affected only the *nominatim* ſubſtitutes, whilſt their deſcendants who were called after them were laid under no reſtrictions.

Mrs Macrae Macguire, the wife of Mr Charles Dalrymple, ſucceeded in virtue of this entail, as a *nominatim* ſubſtitute, to the eſtate of Orangefield, and being deſirous to diſpoſe of it, ſhe granted to her eldeſt ſon and heir, James Dalrymple, a diſpoſition, referring to Governor Macrae's ſettlement.

Mr James Dalrymple then entered into a minute of ſale concerning the eſtate, the validity of which came to be tried, in a declaratory action, inſtituted againſt the other heirs of entail by Mrs Dalrymple and her ſon; for whom it was

Pleaded: By directing the prohibitions againſt the *nominatim* ſubſtitutes alone, and leaving to their heirs the abſolute and unlimited property of this eſtate, Governor Macrae's evident purpoſe was merely to prevent the former, in the event of their having no iſſue of their own, from alienating the lands in favour of a ſtranger. In diſponing therefore to her eldeſt ſon and heir, Mrs Dalrymple, inſtead of counteracting, has literally fulfilled the intention of the tailzier. Even in the caſe of an entail, guarded with the neceſſary clauſes againſt the

whole perſons called to the ſucceſſion, the power of an heir in poſſeſſion, to denude of all or part of the eſtate in favour of his apparent heir, has been long acknowledged. *A fortiori*, ſuch a power muſt be competent in the preſent inſtance.

Anſwered: By this entail, which is ſecured by the requiſites preſcribed by the ſtatute 1685, it is, in words the moſt clear and unambiguous, provided, that no deed by the *nominatim* ſubſtitute ſhall diſappoint the order of ſucceſſion therein eſtabliſhed. Hence, as the tranſaction in diſpute has for its avowed object a departure from theſe regulations, it muſt not only be deſtitute of effect, but muſt alſo found the defenders in an action of irritancy againſt Mrs Dalrymple, in whoſe forfeiture, it is to be remarked, by the tenor of this entail, that of her deſcendants is unavoidably included.

Neither is it of importance, that the children of Mrs Dalrymple, by the ſingular conſtruction of this ſettlement, will take the eſtate upon her death as a fee-ſimple, it being a poſſible caſe, that before that period, theſe children, however numerous, may be extinct; an event by which the ſucceſſion would devolve on the other ſubſtitutes, unaffected by her deeds. Nor can the permiſſion given in ordinary entails, of making ſettlements in favour of apparent heirs, which can be attended with no diſappointment of the entailer's views, be extended to warrant a tranfaction confeſſedly calculated to derange the order of ſucceſſion propoſed in this caſe by Governor Macrae.

The Court were of opinion, That this bargain, if carried into execution by Mrs Dalrymple, would infer a contravention of the entail; and therefore aſſoilzied the defenders.

Lord Reporter, *Stonefield.* *John Erſkine.* Act. *Ilay Campbell, R. Dundas.* Clerk, *Home.* Alt. *George Fergusſon,*

C.

N° CIV. *March* 1. 1783.

JAMES MURRAY,

AGAINST

JOSEPH MACKWHAN.

PACTUM ILLICITUM.—*Combination of intended offerers at a public ſale.*

A Tenement ſituated in the town of Kirkcudbright was expoſed to judicial ſale at Edinburgh. The only perſons who intended to purchaſe this ſubject were Mackwhan, together with William Johnſton and

and John Hutton, all of whom were commiſſioned by other people for that purpoſe.

Theſe men, deſirous to take advantage of their ſituation, by acting in concert, formed the following ſcheme. One of them, for their common benefit, was to purchaſe the ſubject at the upſet price. Each man was then to mark ſecretly on a ſlip of paper the higheſt offer which he had been commiſſioned to make, and he whoſe offer was found on compariſon to exceed the reſt, was to be preferred to the purchaſe; whilſt the exceſs of that higheſt offer beyond the upſet price was to be diſtributed among the aſſociates, to the amount to which their ſeveral offers ſhould have concurred. The tenement being ſold for L. 300, the upſet price, the reſult accordingly was, that as Hutton's commiſſion exceeded that ſum in L. 98, that of Johnſton in L. 210, and that of Mackwhan in L. 300; ſo to the extent of L. 98, all their offers thus far concurring, there fell to be an equal diviſion among them; and two of them, Johnſton and Mackwhan, likewiſe uniting in the offer of L. 210, the exceſs of that ſum above the former offer came to be ſhared between them: But here the diſtribution ended, the concurrence reaching no farther. Mackwhan being of courſe preferred to the purchaſe, granted bills to his aſſociates for thoſe reſpective ſums.

Of thoſe proceedings, as being groſsly fraudulent, Mr Murray, the purſuer of the action of ſale, complained to the Court by a petition, in which he prayed that the ſale might be declared void, and the ſubjects expoſed to roup of new; and in ſupport of his application, he

Pleaded: The juſt price of ſubjects expoſed to ſale is that which is produced by the higheſt offer of purchaſers, in competition. It is in reference to that probable contingent amount that the upſet price is calculated and adjuſted; not as being itſelf the true value of ſuch ſubjects. Any interference then of intereſted perſons, to prevent the effect of a public and fair ſale in producing competition, is a wrong; the magnitude of which will be influenced by the degree of the *mala fides* or fraud from which it ariſes. In the preſent caſe, the fraudulent deſign of the combination is apparent, and the loſs thence reſulting great; the ſubjects having been ſold for a price far below what they are worth. Were practices of this kind to be permitted, it is evident how pernicious they would prove in all caſes like the preſent, in which ſubjects ſituated in remote parts of the country, are in this manner brought to ſale in a place where ſo few perſons are acquainted with their real value.

Anſwered: The articles of roup, which declare the upſet price, as that for which, if no higher be offered, the ſubjects expoſed are to be ſold, form the contract between the ſeller and any purchaſer. When therefore that price is offered, and thus one part of the contract is fulfilled, performance of the counter-part cannot but be juſt. Nor is there any thing illegal in ſuch a combination as that in queſtion, which is not to be diſtinguiſhed from a copartnery formed for the purpoſe of making a purchaſe. Nothing ſurely can be more lawful than

than this, and yet it is a natural effect of ſuch a contract, to prevent competition, which conſiſts in the mutual oppoſition of individuals. Combinations of purchaſers too at exciſe and cuſtomhouſe ſales occur daily; and no attempt has ever been made to prevent them, becauſe there is no law on which it could be founded.

Obſerved on the Bench: What the ſubject would have brought on a fair ſale is its juſt value; a conſiderable part of which, inſtead of paſſing into the hands of the creditors, has been wrongfully pocketed by thoſe aſſociates; the effect of whoſe combination is the ſame, as if force or deception had been employed by ſome of them to debar the reſt from coming to offer.

The judgment of the Court was as follows: "The Lords find, That "the combination entered into between Mackwhan and the other "perſons above named was illegal: Therefore find, That the "ſaid ſale is void and null, and that the ſubjects muſt be expo- "ſed to ſale of new: Find, That Mackwhan is liable in payment "to Mr Murray, not only of the expence of this application, of "which allow an account to be given in, but alſo of the expence "of the new letters of publication, and whole other expence to "be incurred in carrying the ſale into execution."

Mr Murray afterwards preferred another petition, ſetting forth, there being reaſon to apprehend that the influence of the ſame perſons would in another ſhape be ſtill exerted to prevent the ſucceſs of a new ſale; and therefore praying, that Mackwhan might be found liable to pay a price to the full extent of his commiſſion, *i. e.* L. 300 above the upſet one.

The Court were of opinion, That it was juſt, beſides annulling the ſale, to grant reparation of any other damage which could be qualified as ariſing from the combination; and as Mackwhan, in terms of the articles of roup, on exceeding, by L. 5, the higheſt offer of Johnſton, whoſe *maximum* was L. 210 above the upſet price, muſt have been preferred to the purchaſe;

The Lords therefore found Mackwhan liable in payment of L. 515.

For the petitioner, *Rolland.* Alt. *Ilay Campbell.* Clerk, *Home.*

S.

N° CV.

N° CV. *March* 3. 1783.

Sir WILLIAM FORBES, and others,

AGAINST

JOHN RONALDSON.

PUBLIC POLICE.—*Piazzas on the ſides of the High ſtreet of Edinburgh.*

ON the weſt ſide of the entry from the High ſtreet to Gray's cloſe there is a piazza ſupported by pillars, bounded on the ſouth and weſt by a ſhop and cellar belonging to Mr Ronaldſon, and on the north by the plain-ſtone pavement.

Mr Ronaldſon intending to advance his ſhop to the pavement, by taking into it the area occupied by the piazza, obtained for this purpoſe the conſent of ſome of the inhabitants of Gray's cloſe, and a warrant from the dean of guild of the burgh.

Of this procedure, as prejudicial to the public, by narrowing the entry to the cloſe, and depriving paſſengers of the ſhelter afforded by the piazza, Sir William Forbes and others complained by bill of ſuſpenſion.

Pleaded in defence: As the rights under which the defender poſſeſſes his ſhop and cellar are limited by "the entry to Gray's cloſe on "the eaſt," and "the public ſtreet on the north," the area within the piazza, which, with no propriety, can fall under either of theſe deſcriptions, muſt be held as his property, by occupying which occaſionally with articles of merchandiſe, he has derived every benefit of which, in its preſent condition, this ſpot of ground is capable. Nor can the tranſitory accommodation of ten or a dozen of paſſengers, when productive of no ſort of inconveniency to the defender, be preſumed to have introduced a ſervitude of this anomalous nature, and to have diſabled him from converting his property to a more beneficial purpoſe.

Could this ſpace be conſidered as a part of the public ſtreet, it ought not to be permitted to a few individuals, from motives of caprice, to oppoſe an alteration which, without any ſenſible inconvenience to the public, is greatly conducive to the beauty of the ſtreet, and which, on this account, has received the approbation of the neighbours, and of that officer within the burgh whoſe peculiar province it is to ſuperintend matters of this ſort. Hence, though by far the greateſt part of the high ſtreet of this city ſeems in ancient times to have been bounded by piazzas, ſcarcely a veſtige of theſe remains; the conterminous heritors, when rebuilding their houſes, having been allowed without challenge to follow the meaſures adopted by the defender.

 Anſwered:

Anſwered: From the hiſtory of this city it appears, that in the beginning of the 16th century the magiſtrates, in order to promote the ſale of the wood belonging to the community, permitted the purchaſers to advance the fronts of their houſes ſeven feet into the ſtreet, upon their leaving theſe new fronts ſupported with pillars for the conveniency of paſſengers; Maitland's Hiſtory of Edinburgh. The ſpace, therefore, occupied by theſe piazzas is the property of the public.—At any rate, it has for ages been uſed as part of the public ſtreet, on which no private party, upon pretence of improvement, can be allowed to encroach. Nor can former precedents, occurring through the connivance or neglect of the magiſtrates, and now ſanctified by long poſſeſſion, afford an excuſe for new alterations. Although the magiſtrates conſented, every inhabitant of the burgh has a right to put a ſtop to them; Dict. of Deciſ. vol. 3. *ad h. t.*

The Lord Ordinary "having viſited the ground, repelled the reaſons of ſuſpenſion;" but the Court, conſidering the alteration to be an encroachment on the public ſtreet, altered that interlocutor, and

"Suſpended the letters."

Lord Ordinary, *Kennet.* Act. *Nairne, Tytler.* Alt. *Maclaurin.*
Clerk, *Home.*

C.

N° CVI. *June* 17. 1783.

JEAN DONALDSON,

AGAINST

JAMES HAY.

MINISTER.—HUSBAND AND WIFE.—*Whether the ſums due by the act* 17. *Geo. II. c.* 11. *to the daughters of a miniſter fall under the* jus mariti. Dies cedit ſed non venit.

MR DONALDSON, miniſter at Glammis, died in September 1779, leaving one daughter, who was married to Mr Hay.

Mr Hay died in March 1781; when a queſtion aroſe, whether the ſums due to his wife, as the child of a miniſter, in conſequence of the ſtatute 17. Geo. II. c. 11. had fallen under his *jus mariti.*

The merits of this queſtion depended on the conſtruction of the following clauſes.

"And be it enacted, by the authority aforeſaid, That the payments

ments herein after directed ſhall be made to the children or widows reſpectively named in the warrants, if the perſons ſo named are majors, and to the tutors of ſuch of them as are minors; and if they have no tutors or curators, to ſuch perſon or perſons as ſhall be authoriſed for that purpoſe by an act of the preſbytery or univerſity reſpectively, of which the perſon under whom the proviſion is claimed was laſt a member."

"And be it enacted, &c. That the foreſaid annuities payable to the widows, and the proviſions payable to the children of the aforeſaid miniſters of the church of Scotland, and of the heads, principals, and maſters of the aforeſaid univerſities, ſhall not be liable to any arreſtment, but ſhall be paid to the widows and children themſelves, or to their tutors or curators, or truſtees aforeſaid, or to their executors, adminiſtrators, or aſſignees, any law or uſage to the contrary notwithſtanding."

"And be it enacted, &c. That the proviſions to the children of miniſters, &c. falling due in conſequence of the death of their reſpective fathers, or of the death or marriage of the widows of their ſaid fathers, in any one year, computed from the 22d day of November in the year following, ſhall be payable on the 13th of Auguſt *thereafter*, in the manner herein after mentioned."

Pleaded for Mrs Hay the relict: 1*mo*, It was the intention of the legiſlature by this ſtatute to ſecure to the widows and children of miniſters a fund of a perſonal and alimentary nature. As care has been taken that it ſhould not be attachable for their debts, it would be highly incongruous, that by falling under the *jus mariti*, it ſhould become attachable for thoſe of their huſbands.

2*do*, In terms of this ſtatute, the period of Mr Donaldſon's death muſt be held to have been the 22d of November 1780. The proviſion, therefore, to his daughter was not exigible till the 13th of Auguſt 1781. Of courſe, Mr Hay, her huſband, having died in March 1781, the money due from this fund never veſted in his perſon *jure mariti*.

Anſwered: 1*mo*, A huſband being the legal curator of his wife, and marriage a legal aſſignment of her perſonal eſtate, the ſums due to the children of miniſters, which are exigible by their tutors and curators, and tranſmiſſible by aſſignation, muſt belong to the huſbands of ſuch as are married.

Nor do the conſequences ſuppoſed to flow from this doctrine tend to any thing abſurd or irrational. While the perſons who are the objects of this enactment remained unmarried, it was exceedingly proper that what was intended for their ſubſiſtence ſhould be unattachable by their creditors. But as by marriage, a claim of aliment of a more permanent, and generally of a more beneficial nature, ariſes in their favour, the reſtriction formerly affecting this ſpecies of property was no longer neceſſary.

2*do*, The ſums now in diſpute, although not exigible till Auguſt 1781, became due to Mrs Hay the moment her father died.

The

The Lords found, "That the ſums due to Mrs Hay, as the daughter "of a miniſter, had fallen under the *jus mariti* of her huſband."

Lord Reporter, *Hailes.* Act. *Croſbie, Geo. Ferguſſon, Alex. Ferguſſon.*
Alt. *Nairne, Sir John Ramſay.* Clerk, *Robertſon.*

C.

N° CVII. *June* 18. 1783.

JOSEPH CAUVIN,

AGAINST

Dr JOSEPH ROBERTSON.

COMPENSATION and RETENTION. BANKRUPT. *A debtor to a bankrupt afterwards acquiring a debt due by the latter, cannot claim retention of it beyond the proportion of payment falling to the other creditors.*

DR ROBERTSON rented a houſe belonging to Louis Cauvin, who was debtor by bill to a company of which Dr Robertſon was a partner; and who likewiſe owed a debt to the Doctor individually. Louis Cauvin died inſolvent, and his ſon Joſeph Cauvin entered heir to him *cum beneficio inventarii.* Dr Robertſon, who had paid to Louis Cauvin the rents due during his lifetime, continued to poſſeſs the houſe ſeveral years after his death, and in the mean time took an indorſation to himſelf alone of the aforeſaid bill.

Joſeph Cauvin, the heir *cum beneficio*, having demanded payment of the rents for theſe laſt-mentioned years, the Doctor claimed retention, *firſt*, of the debt due by Louis Cauvin to him as an individual; and, *ſecondly*, of the contents of the bill indorſed to him after the latter had died inſolvent.

The Court ſeemed to be influenced by this conſideration, that if the debtors of perſons inſolvent were to be permitted thus to avail themſelves of aſſignations obtained from particular creditors, it would be eaſy to diſappoint the remainder of them of that rateable and juſt payment of debt to which they are entitled.

The Lord Ordinary had "found Dr Robertſon not entitled to re-"tention of *either* debt.

The

The Court altered his Lordſhip's interlocutor, ſo far as to find Dr Robertſon entitled to retention of the debt originally due to him as an individual; while they adhered to it with regard to the bill indorſed after the bankruptcy.

Lord Ordinary, *Alva.* Act. *Cha. Hay.* Alt. *Nairne.*
Clerk, *Colquhoun.*

S.

N° CVIII. *June* 20. 1783.

GEORGE ROBERTSON,

AGAINST

ALEXANDER RAMSAY.

ARBITRATION.—*Award, though ſigned by the arbiters, and delivered to their clerk, may be altered by them.*

ALEXANDER RAMSAY being charged on a decreet-arbitral, decerning him to pay L. 130 Scots to George Robertſon, in a bill of ſuſpenſion,

Pleaded: Before pronouncing this award, the arbiters had given a judgment, finding the ſuſpender liable only in L. 3 Sterling, which had been ſigned by them, and delivered to the clerk of the ſubmiſſion. In this manner their authority was at an end, and the rights of the parties unalterably aſcertained.

Anſwered: Till an award has been delivered to the parties, or put upon record, it may be reviſed, or altered by the arbiters, in the ſame manner as the interlocutor of a judge, before it is put into the proceſs. The clerk in a ſubmiſſion being the ſervant of the arbiters, his poſſeſſion of the ſigned award in this caſe was of no greater effect than that of the arbiters themſelves.

The Lords "found the letters orderly proceeded, and expences "due."

Lord Ordinary, *Braxfield.* Act. *Cha. Hay.* Alt. *Sir John Ramſay.*
Clerk, *Menzies.*

C.

N° CIX. *June* 25. 1783.

EDWARD YOUNG,

AGAINST

ROBERT JOHNSTON.

BANKRUPT.—*Reduction on act* 1696, *of a conveyance of moveables.*

JOHNSTON was a creditor of Thomas Turnbull, who afterwards became bankrupt. George Turnbull, brother of Thomas, having joined with him in granting a bill to Johnſton for the debt, Thomas, not long before, or about the time of his bankruptcy, put into the hands of George a parcel of wool, which the latter conveyed to Johnſton, who, in return, delivered up to him the conjunct bill.

Young, as truſtee for the creditors of Turnbull, brought an action of reduction of this tranſaction, upon the ſtatute of 1696.

The Lord Ordinary gave judgment in terms of the libel.

In a reclaiming petition preſented to the Court, Johnſton argued as follows: It is clear, that the ſanction of the ſtatute does not reach to payments in money made by inſolvent perſons, to their creditors. Suppoſing then that even Thomas Turnbull, the bankrupt, had ſold the wool in queſtion to the petitioner, for caſh inſtantly paid to him, and had repaid that caſh *in ſolutum* of the debt, the tranſaction would have been unchallengeable: a caſe which would have differed in nothing from that of delivery of the wool *in ſolutum*, except in the omiſſion of the truly inſignificant ceremony of giving, and immediately receiving back the money: ſo that the latter bargain could not have been challenged more than the former; July 21. 1758, Grant *contra* Smith, Fac. Coll. In fact, however, the goods were not received by the petitioner from the bankrupt; but it was George Turnbull, who had himſelf either bought them, or had obtained them for his relief, who ſold them to the petitioner for a fair and adequate price; which price was the bill granted by himſelf, as well as by Thomas, the bankrupt. If, however, it ſhould be ſaid that the previous conveyance by Thomas to George was invalid, the anſwer would be, that *mobilia non habent ſequelem*, and that a purchaſer is not to be affected by the prior tranſactions of the ſeller. This conſequence indeed is expreſsly guarded againſt by the ſtatute 1621, c. 18.

The Court ſeemed to conſider the ſpecialties of this caſe, as of no importance; and, in general, obſerved, that, if the plea, of goods having

having been delivered *in ſolutum*, and not in ſecurity, were to be admitted in ſupport of ſuch a conveyance as that in queſtion, it would be eaſy in any caſe to evade the ſalutary regulations of the ſtatute 1696.

The Lords therefore refuſed the petition without anſwers.

A ſecond reclaiming petition was preſented, which, ſo far as reſpected the above point, was likewiſe refuſed without anſwers.

Lord Ordinary, *Weſthall.* For the Petitioner, *Geo. Wallace, Henry Erſkine.*

S.

N° CX. *July* 4. 1783.

LESLIE and THOMSON,

AGAINST

DAVID LINN.

POLICY OF INSURANCE. FACTOR.—*Retention by an inſurance-broker.*

LESLIE and THOMSON, inſurance-brokers in Edinburgh, were employed by Maclean, a merchant in Leith, to get inſurance on a ſhip done for him at Glaſgow. The brokers, in effecting this inſurance, had the policy taken out in their own names. Accordingly, a loſs having happened, one of the underwriters granted his bill for his ſhare, in favour of Leſlie and Thomſon. This bill, however, was by him tranſmitted to Maclean, who had previouſly got the policy into his cuſtody; upon which Maclean indorſed and delivered it to Linn.

Leſlie and Thomſon inſiſted for delivery of the bill to them, on this ground, that Maclean having been previouſly indebted to them, they, with a view to avail themſelves of the poſſeſſion of the policy for operating their payment in the event of a loſs, had accepted the commiſſion from Maclean; and for their farther ſecurity had the policy made out in the above manner. In a proceſs of multiplepoinding, appearance having been made for Linn, they, in ſupport of this claim,

Pleaded: The bill in queſtion being payable to them, and not to Maclean, the indorſation in favour of Linn by the latter, cannot confer the ſpecial privileges competent to indorſees of bills of exchange.

Linn,

Linn, therefore, in this competition, ſtands on the ſame footing as Maclean himſelf would have done; and the queſtion is, which of the parties has right to the contents of the bill, as the inſured value, in part, payable by the underwriters.

An inſurance-broker is to be conſidered as a factor acting on commiſſion; and as it is eſtabliſhed that a factor is entitled to retention of the ſubject of his factory, for ſatisfaction of debts due to himſelf by his conſtituent, ſo it is lawful for an inſurance-broker to retain poſſeſſion of the policy for ſecurity or payment of debt owing to him by the party on whoſe commiſſion he acts. This rule is founded on the practice of merchants, and in England has been exemplified by a judgment of the Court of King's Bench, in February 1778; Godin *verſus* London Aſſurance Company; Burrow's Reports, vol. 1. p. 490. In this particular caſe, the policy was made out in the names of Leſlie and Thomſon; and therefore, though Maclean actually got it into his cuſtody, the effect reſpecting the latter, is the ſame as if it had ſtill remained in the poſſeſſion of the former.

Anſwered: As to the power of retention competent to a factor, it is not diſputed. But an inſurance-broker acting in his proper ſphere, is not a factor. If, indeed, the inſured, beſides commiſſioning him to make the inſurance, which is his peculiar office, were farther ſpecially to authoriſe him to retain the policy, and in the event of a loſs, to recover the ſums underwritten, then he might ſo far aſſume the character of factor, and plead the privileges of ſuch. But whilſt his employment is not thus extended beyond its proper limits, his commiſſion is ſtrictly confined to the effecting of the inſurance, by making the bargain with the underwriters; upon doing which, it is his duty inſtantly to deliver up the policy to his employer, who may have immediate occaſion for it, as in the event of his transferring the cargo ſo inſured to a purchaſer. As for the policy in this caſe being framed in the name of the inſurance-brokers, that circumſtance muſt paſs for nothing, as being unauthoriſed by Maclean.

The Lord Ordinary "preferred David Linn to the principal ſum "and intereſt contained in and due by the accepted bill produced."

The Court, however, altered that interlocutor, and preferred Leſlie and Thomſon.

Lord Ordinary, *Anſtruther.* For Leſlie and Thomſon, *Blair.* For Linn, *Wight.*
Clerk, *Home.*

S.

N° CXI.

N° CXI. *July* 4. 1783.

EDWARD YOUNG,

AGAINST

JOHN GRIEVE, and others.

BANKRUPT—*Not being found in his dwelling-houſe by a meſſenger about to execute caption, imports abſconding.*

IN this caſe, the circumſtances of a debtor's not being found in his dwelling-houſe by a meſſenger ready to execute a caption againſt him, and of his family not giving information whither he had betaken himſelf, were conſtrued to be ſuch an abſconding as is founded on in the act of 1696.

Lord Ordinary, *Weſthall.* Clerk, *Campbell.* Act. *Maclaurin.* Alt. *Henry Erſkine.*

S.

N° CXII. *July* 10. 1783.

JOHN HAY,

AGAINST

PATRICK PANTON.

SALE.—*Sufficient progreſs.*

MR HAY, as truſtee for the creditors of a bankrupt, expoſed to ſale the ſubject poſſeſſed by the latter, and, among others, a ruinous tenement in the burgh of Kelſo which had been adjudged by his creditors.

By the articles of roup it was provided, that the creditors ſhould aſſign to the purchaſers their debts and rights, with warrandice to the extent of the price; and that the purchaſer ſhould accept ſuch titles as were in the poſſeſſion of the creditors, which were ſpecified by an inventory.

Patrick Panton having become purchaſer of the tenement above mentioned, and diſcovering that the inventory contained no right veſting the ſubject in the common debtor, brought a ſuſpenſion, in which the Lord Ordinary found, "That the ſuſpender was not barred by the articles of roup from objecting, that no right whatever in the perſon of the common debtor is produced, or, though ſuch title were produced, from objecting the nullity thereof, if ſuch ſhould appear."

Againſt this judgment the charger applied by reclaiming petition.

Obſerved on the bench: A purchaſer is not, in the common caſe, obliged to pay before the ſeller has delivered to him a ſufficient title to the property of the ſubject ſold. Here, however, it having been agreed that eviction alone ſhould entitle the purchaſer to recourſe againſt the ſeller, no reaſon occurs why this paction ſhould not be effectual.

Upon adviſing the reclaiming petition for the charger, with anſwers for the ſuſpender,

The Lords found the letters orderly proceeded.

Lord Ordinary, *Alva.* Act. *Elphinſton.* Alt. *Tait.* Clerk, *Menzies.*

C.

N° CXIII. *July* 10. 1783.

GEORGE TAWSE,

AGAINST

WILLIAM FINDLATER and WILLIAM MURRAY.

PASSIVE TITLE. — TITLE TO PURSUE.

FINDLATER and Murray appointed Alexander Cheyne their ſupercargo in a voyage from Peterhead to Bergen, he being to receive, as his reward, a certain ſhare of the profits of the adventure.

Cheyne happened to die on his return, when he had almoſt reached the land; and on his body's being carried aſhore, Findlater and Murray, apprehenſive, as it ſhould ſeem, of ſuffering loſs through his conduct in the buſineſs, beſides laying hold of the cargo homeward bound,

bound, intromitted with his perſonal effects, particularly the money in his pockets, without having taken any legal ſtep for authoriſing them ſo to do.

Afterwards, Tawſe a creditor of Cheyne's, but who had not *expede* confirmation, purſued them as vitious intromitters.

Pleaded for the defenders: The *bona fides* with which they acted muſt not only exempt them from the character and penal conſequences of vitious intromiſſion, but entitles them to retention of the ſums in their hands for payment of the debts due to them by the defunct. On the other hand, the purſuer, not having made up a title by confirmation, has no right at all to inſiſt in the action.

Anſwered: By their intromiſſion, the defenders have ſubjected themſelves to an univerſal paſſive repreſentation of the deceaſed, and are therefore ſued as perſonally liable for his debts. So that it is not the object of the purſuer to attach the moveables of the deceaſed as *in bonis defuncti*, in which caſe alone confirmation could have been of any uſe.

The general opinion of the Court was, That though there was no ground for ſubjecting the defenders univerſally as vitious intromitters, yet that they ſo far ſtood in that light as to authoriſe the preſent action to the amount of the effects intromitted with.

Accordingly the Lords found the defenders liable to that extent.

Lord Ordinary, *Braxfield.* Act. *Rolland.* Alt. *Maconochie.*
Clerk, *Orme.*

S.

N° CXIV. *July* 15. 1783.

PETER ROSE WATSON,

AGAINST

ELISABETH GORDON.

PAPIST,—*May ſucceed to a leaſe of lands.*

IT having been provided by act 1701, c. 3. "That no perſon or "perſons profeſſing the Popiſh religion ſhould be capable to ſuc- "ceed as heirs to any perſon whatſoever, nor to bruik or enjoy any "*eſtate* by diſpoſition, or other conveyance, flowing from any perſon "to whom the Papiſt might ſucceed as heir any manner of way, un-

"til

" til the ſaid heirs purge themſelves of Popery in the manner preſcri-
" bed by the ſtatute;" a queſtion aroſe between theſe parties, Whether a Papiſt could ſucceed to a leaſe? the clauſe above recited being conſidered by the one as an excluſion of Papiſts from ſucceſſion in all ſubjects deſcending to heirs, while the other contended, that it related to landed property alone.

For Mrs Gordon, the Papiſt, it was

Pleaded: The rigorous penalties by this ſtatute impoſed on perſons on account of their ſentiments in religion, dictated partly by the critical ſituation of the Proteſtant intereſt in the beginning of the preſent century, and partly by the intolerant ſpirit of thoſe times, ought at this period to receive the moſt limited interpretation.

Though on account of its endurance, a leaſe does not go to executors, and though by particular ſtatute it is endued with a real quality of affecting ſingular ſucceſſors in the lands, it is of its nature a contract ſtrictly perſonal. In common language it is held as a tenure very different from a right of property in lands, and in many inſtances, inſtead of deſerving the appellation of an *eſtate*, contains a very loſing bargain on the part of the tenant.

That the expreſſion here uſed by the Legiſlature is applied in its moſt limited ſenſe, is ſufficiently apparent. In a preceding clauſe, after an enumeration of real rights, tacks are mentioned as a ſeparate ſubject. A power is there given to landlords to aſſume the poſſeſſion of lands let to Papiſts, which, though equally requiſite for their ſecurity if tacks were comprehended, has been neglected here; and Papiſts are allowed to renounce their errors in ten years, which could be of little avail in rights which ſeldom endure for more than nineteen years. By the ſame ſtatute it is declared, that the legal of adjudications ſhall never expire in the perſon of a Papiſt; and by 10th of Queen Anne, the ſheriff of the county, or any two juſtices of the peace, are empowered to tender the *Formula* to patrons ſuſpected of Popery; which would have been entirely unneceſſary, if thoſe rights could not be tranſmitted in ſucceſſion.——And in practice, bonds ſecluding executors, penſions, titles of honour, and offices of dignity, although deſcendible to heirs, are poſſeſſed by Papiſts without challenge.

Anſwered: As by the firſt part of this ſtatute tacks are enumerated among the rights which a Papiſt is declared incapable of acquiring, the ſubſequent clauſe, which reſpects ſucceſſion under the comprehenſive denomination of *eſtate*, muſt be underſtood to have included this ſort of poſſeſſion, which deſcends to heirs, was in ancient times completed by infeftment, and which, as it is capable of enduring for many centuries, may be of infinitely greater value than the right of property itſelf.

There would have been an obvious impropriety in preventing Papiſts, who are under no diſability with regard to moveable rights, from ſecuring or recovering payment of the debts due to them by means of adjudication. But although it were admitted, that the general expreſſion in this clauſe was ſo reſtricted as to exclude theſe

and

and the other rights ſpecified by Mrs Gordon, which are not particularly mentioned in the former, no reaſon ſeems aſſignable why a leaſe, which a Papiſt cannot acquire by ſingular titles, ſhould be valid in the perſon of his heir, who is of the ſame perſuaſion. The ſtatute of Queen Anne, quoted on the other ſide, was obviouſly intended to prevent the neglect of the next Proteſtant heir from hurting the intereſts of the eſtabliſhed religion.

The Lords were unanimouſly of opinion, that leaſes neither fell under the words nor the ſpirit of this part of the ſtatute. One of them obſerved, that the reaſon why tacks, although not real rights, had been included in a former clauſe, was to hinder Papiſts from diſappointing the ſtatute, by obtaining leaſes of lands for eluſory tack-duties. And another obſerved, that the power given to the next Proteſtant heir to make up titles to the eſtate by ſervice, as if the Papiſt were dead, implied an exception of tacks, and other rights which are tranſmitted without ſervice.

The Lords preferred Mrs Gordon the Papiſt.

Lord Reporter, *Eſkgrove.* Act. *Hay.* Alt. *Abercromby.* Clerk, *Home.*

C.

N° CXV. *July* 26. 1783.

JOSEPH SCOFFIER,

AGAINST

WILLIAM READ, and SAMUEL READ, his father, and adminiſtrator-in-law.

MINOR,—*How far liable for money and goods furniſhed to him.*

WILLIAM READ, the ſon of a merchant in London, in the ſixteenth year of his age, was bound apprentice to Mr Hay, ſurgeon in Edinburgh, who had directions to advance every thing neceſſary for his ſubſiſtence and education.

Soon after his arrival in Scotland, Mr Read became debtor to Joſeph Scoffier, haberdaſher in Edinburgh, in the ſum of L. 50 Sterling, partly on account of money advanced by Mr Scoffier, and partly for goods furniſhed by him. For this ſum, Mr Read drew bills on his father, which the latter refuſed to accept.

In an action for recourſe againſt the minor, in which compearance was made for Mr Read the father, the Lord Ordinary pronounced

the following judgment, which was adhered to by the Court upon adviſing a reclaiming petition for Mr Scoffier.

" In reſpect it is admitted by the purſuer, that the defender, Wil-
" liam Read, is a minor, and that he, the purſuer, who is not a
" banker or profeſſed dealer in bills of exchange, had no mandate
" from his, the ſaid William Read's father, the other defender, to
" make advances to or for him; but that, on the contrary, ſuch
" commiſſion had been given by his father to Mr Thomas Hay, in
" whoſe houſe the ſaid William Read lodged, and to whom he was
" then bound an apprentice, and who, it is not alleged, had refuſed
" to ſupply the defender William Read with ſuch furniſhings as were
" neceſſary and ſuitable; finds, That the purſuer acted raſhly and
" improperly in lending or advancing to the ſaid William Read, on
" the 23d of October 1782, the ſum of L. 16: 16: 6 Sterling, upon
" getting the ſaid defender's bill or draught on his father, then re-
" ſiding in London, for L. 20 Sterling, and ſo ſoon as the 4th of
" November following, advancing to him another ſum of L. 16: 2: 11
" Sterling, upon getting a ſecond bill or draught from the defender
" on his ſaid father for L. 30 Sterling; and both which bills were
" returned proteſted for not acceptance: And in reſpect the purſuer
" does not offer to prove that the ſaid two ſums of L. 16: 16: 6 and
" L. 16: 2: 11 Sterling were afterwards uſefully applied to the
" clothing, education, or maintenance of the ſaid defender, finds,
" That the ſaid two bills muſt be held as in ſo far granted by the de-
" fender, a minor, without conſent of his father as adminiſtrator-in-
" law, to the leſion and prejudice of him the ſaid defender; therefore
" aſſoilzies as to the ſaid two ſums, part of the contents of the two
" bills ſued on; and alſo aſſoilzies as to the farther ſum of L. 6: 9: 5
" Sterling, admitted to have been included in the contents of the
" L. 30 bill, as the price or value of a woman's black ſilk cloak, which
" the purſuer muſt have known to have been intended for the uſe of
" a perſon of the female ſex, and not to be uſed or worn by the de-
" fender; but in regard it is admitted on the part of the defender,
" that the remaining ſums contained in the ſaid two bills, *viz.* the
" ſum of L. 3: 3: 6, contained in the firſt bill for L. 20, and the ſum
" of L. 7: 7: 8, included in the ſecond bill of L. 30, were ſums due
" by the defender William Read to the purſuer, on account of articles
" of wearing apparel furniſhed by the purſuer to the defender, de-
" cerns againſt the ſaid defender William Read for the ſaid two laſt
" mentioned ſums, amounting together to the ſum of L. 10: 11: 2
" Sterling."

Lord Ordinary, *Eſkgrove.* Act. *Cullen.* Alt. *Ro. Sinclair.*

C.

N° CXVI.

N° CXVI. *July* 29. 1783.

DOUGLAS, HERON, and COMPANY,

AGAINST

MARY CANT.

PRESUMPTION,—*Whether the delivery,* ſine arbitris, *of a bond of proviſion, by a huſband to his wife, imports a derelict on of her legal proviſions.*

MRS MARY CANT was the wife of William Hay, of whom Douglas, Heron and Company were creditors.

Soon after her marriage, her huſband delivered to her privately a bond for an annuity, payable to her in the event of her ſurvivorſhip. This bond ſhe retained in her cuſtody until his death; which, however, was the only circumſtance whence her acceptance of the proviſion could be inferred.

Her huſband died poſſeſſed of a landed eſtate then unincumbered by any heritable ſecurity; leaving debts, however, with which it became afterwards affected, to an extent beyond the value of his whole funds. As by virtue of the bond, therefore, ſhe could have recovered nothing, ſhe was, ſeveral years after her huſband's death, ſerved to her terce, and then demanded her proportion of the rents of his lands. To this claim the creditors objected, and

Pleaded: The bond in queſtion, an irrevocable deed, undoubtedly became effectual from the moment of delivery by the granter, and of acceptance by the grantee. Mrs Hay was thus veſted with a right, of which her not chuſing to exerciſe it did not diſpoſſeſs her; and of which, the effect is, on the one hand, to entitle her, as a perſonal creditor of her huſband, to a conventional proviſion; and, on the other, to bar her claim to the legal proviſion of terce. In a different ſituation of her huſband's affairs, in which ſhe might not have been precluded by the heritable ſecurities of creditors, ſhe would have reſorted to this bond with advantage; and in the event of his having ſold his lands ſhe could not have looked for a proviſion from any other ſource. Her huſband's onerous creditors muſt then have ſubmitted to her claim. As matters now ſtand, the operation of the bond is in their favour; and Mrs Hay, in her turn, muſt of conſequence yield her pretenſions to the terce. For ſurely it cannot be maintained, that no effect is to be given to that deed, except ſuch as is prejudicial to the creditors, and advantageous to Mrs Hay.

Anſwered: Mrs Hay has not done any act which could infer homologation of the bond in queſtion. The circumſtance of her ſimply receiving

receiving it from the hand of her huſband, without offending whom, perhaps, ſhe could not have done otherwiſe, is certainly not ſuch. Thus far a regard to her duty muſt have enforced her compliance; and it would be hard were her reward to be the forfeiture of her legal claims.

The Court diſtinguiſhed between formal marriage-contracts entered into with the advice and aſſiſtance of the friends of the parties, and private unadviſed deeds, ſuch as the one in queſtion. Should theſe laſt, it was obſerved, have an effect, like the former, to the excluſion of the legal proviſions, hurtful conſequences might often enſue from the peculiar circumſtances of perſons entering into the married ſtate. In this caſe, too, it was added, the creditors had no reaſon to complain of any deception being practiſed upon them.

The Lords, on report of the Lord Ordinary, "found that Mrs Hay "was not barred from claiming her legal proviſion of terce by the "bond of annuity above mentioned."

Lord Reporter, *Braxfield.* Alt. *Wight.* For Douglas, Heron and Company, *Blair.* Clerk, *Robertſon.*

S.

N° CXVII. *Auguſt* 5. 1783.

CREDITORS of CULT,

AGAINST

The YOUNGER CHILDREN.

BANKRUPT. ACT 1621.—*In bonds of proviſion to children, the ſolvency of the granter when theſe became effectual againſt him, muſt be proved by the children, unleſs the other creditors have been* in mora.

IN 1775, Mr Wardrobe died poſſeſſed of the eſtate of Cult, and ſome moveable funds. In 1777, his creditors, and among theſe his younger children, upon their bonds of proviſion, adjudged; and in the end of the year 1782, the lands were ſold judicially.

In the ranking, the Lord Ordinary found, "That as the creditors "of the father were guilty of no *culpable* neglect, and as there is *now* "a confeſſed bankruptcy, the children are not entitled to compete "on their bonds with the creditors of the father."

Againſt

Againſt this interlocutor the younger children *reclaimed*, and

Pleaded: The object of the ſtatute 1621 was not to render every gratuitous right dependent on the future circumſtances of the donor, but to reſtrain fraudulent alienations, by perſons in a ſtate of inſolvency, in favour of their confidents and relations. The validity therefore of rights with regard to this ſtatute muſt be regulated by the ſituation of the granter when theſe became effectual againſt him. In the caſe of proviſions to children, which are ſubject to revocation, the father's death is the period to be attended to; and no ſubſequent alteration, whether proceeding from the conduct of the other creditors, or any other contingency, ought to impair ſettlements, which, though not viewed as onerous in a queſtion with the granter's creditors, are in every other reſpect of the moſt favourable and rational nature; Erſkine, book 4. tit. 1. § 34.; Gosford, 5.; Stair; Dirleton, January 6. 1677, Children of Mouſewell *contra* his Creditors; Stair, December 11. 1679, *inter eoſdem*; February 7. 1679, Hamilton *contra* Hay; January 12. 1697, Kinroſs *contra* Carnegie.

Anſwered: The Lord Ordinary's interlocutor, when duly compared with the circumſtances occurring in this caſe, does not in the leaſt impinge on the principle, that proviſions to children in a queſtion of this ſort depend on the ſolvency of the granter at the period when theſe became the foundation of a proper action againſt him. Here the younger children are unable to point out any diminution of their father's funds, from miſconduct on the part of the heir, or any other extraneous accident. Their competitors have uſed every diſpatch in diſcuſſing the eſtate of their debtor which the nature of their diligence could admit. No reaſon therefore can be offered for ſuppoſing that the funds would have been more productive at the common debtor's death than at the moment of this ranking.

Obſerved on the Bench: In the circumſtances of this caſe the juſtice of the Lord Ordinary's deciſion cannot be diſputed. Yet as the words are capable of the interpretation given to them by the petitioners, it may be proper, for preventing any miſapprehenſion from the precedent, to vary the terms in which it is conceived.

The interlocutor pronounced by the Court was in theſe words: "Find, That the creditors were guilty of no culpable neglect, in not "doing diligence ſooner for their debts: Alſo find, That there is now "confeſſedly an inſufficiency of funds belonging to the late William "Wardrobe, for payment of his debts; and that the younger children "of the ſaid William Wardrobe have not produced ſufficient evidence "to ſhow that their father's eſtate in Scotland, at the time of his death, "was ſufficient to anſwer the debts he then owed, and their provi-"ſions; and therefore find, That the ſaid younger children are not "entitled to compete with theſe creditors of their father."

Lord Ordinary, *Braxfield.* For the Creditors, *Honyman.* For the Younger Children, *Henry Erſkine, Dickſon.* Clerk, *Colquhoun.*

C.

Nota. The younger children inſiſted, that among the funds a debt due by one of their number ſhould be computed; which, with the price of the eſtate of Cult, would have ſatisfied the whole debts as they ſtood at the father's death. The Court were of opinion, as the debtor was confeſſedly unable to pay, and had been in that ſtate ſince the father's deceaſe, that this demand could not be complied with. One of the Judges, however, ſuggeſted, that in the event of a future recovery of this debt, the younger children would be entitled to a preference on it to the effect of receiving what they would have drawn out of the eſtate of Cult had their father been ſolvent at his death. No preciſe judgment was pronounced on this point.

N° CXVIII. *Auguſt* 8. 1783.

Lady MARY CAMPBELL,

AGAINST

George Earl of CRAUFURD.

EXHIBITION.—*Special condeſcendence. How far a haver is entitled to depone on the nature of the writings in his poſſeſſion.*

THE eſtate of Craufurd, when diſponed by William Earl of Craufurd in the year 1678, to truſtees for his creditors, ſtood deviſed to heirs-male by inveſtitures completed in 1648.

In the year 1748, John, then Earl of Craufurd, in order to bring the truſtees to account for their intromiſſions, and to regain poſſeſſion of the inheritance of his family, granted a truſt-bond to Mr George Roſs, who upon it led an adjudication againſt the eſtate.

By the terms of the backbond granted by Mr Roſs, he became bound to denude "in favour of Earl John and *his heirs*, or any other "perſon or perſons to be named by him."—Upon the death of that Earl, therefore, it came to be doubted, whether the benefit of this obligation devolved to Lady Mary Campbell, his ſiſter and heir of line, or to George Earl of Craufurd, the heir-male.

For the purpoſe of determining this point, Mr Roſs called both theſe parties in a multiple-poinding; in which the Earl of Craufurd produced, as his intereſt, the inveſtitures in 1648, already mentioned; and Lady Mary Campbell inſiſted for a diligence againſt havers for recovering certain writings. In ſupport of this demand it was

Pleaded: Lady Mary Campbell's *title* as heir of line to her brother, the truſter, is undoubted; nor is her *intereſt* in recovering the writings called for more queſtionable. The obligation on the truſtees to reconvey, conſidered as relative to the inveſtitures exhibited for the Earl of Craufurd,

furd, it may be admitted in the preſent argument, tranſmits to the latter as heir-male. But as on account of prior ſettlements and limitations, theſe inveſtitures may have proceeded *a non habente*, it muſt be competent for Lady Mary to inſiſt for exhibition of the contracts of marriage entered into by Earl William and his father Earl John, in which ſuch limitations may be contained.

The merits of this competition farther may depend in a great meaſure on the intention of the truſter, when ſtipulating in the backbond granted by Mr Roſs a reverſion in favour of *his heirs*. They muſt be finally aſcertained by a nomination, if ſuch exiſts, executed by the truſter agreeably to the powers contained in the ſame deed. It is therefore exceedingly material for Lady Mary to recover the contracts of marriage between the two Earls, her father and brother, and their reſpective ladies;—the nomination by the latter, in terms of the truſt-bond, of the perſons to whom Mr Roſs is to denude;—the teſtaments executed by him;—the aſſignations and diſpoſitions in favour of himſelf and his heirs;—together with all letters of correſpondence, backbonds, and declarations of truſt, occurring between him and the perſons he employed in tranſactions reſpecting the eſtate of Craufurd.

Anſwered: Demands of this ſort, which may be made for the purpoſe merely of diſcovering the latent defects of title-deeds, are to be granted with the utmoſt circumſpection, and under ſuch reſtrictions as are requiſite to the ſecurity of thoſe whoſe writings are thus endeavoured to be expoſed to public diſquiſition. On this principle no perſon is permitted to require inſpection of a charter-cheſt *per averſionem*; Dict. of Deciſ. *voce* Exhibition; but a condeſcendence muſt be given in, not in the unlimited and general terms here uſed, againſt which the ſame reaſons may be urged as againſt a demand for a general exhibition, but ſpecifying in a particular manner the dates as well as the deſignations of the writings called for.

Nor is this alone ſufficient. The tenor and import likewiſe of the writings muſt be ſo qualified, that their influence on the ſubject of debate, in favour of the perſon by whom the diligence is ſought, ſhall be apparent and deciſive; the other party being entitled to withhold the writings poſſeſſed by him, if he can ſwear that they do not anſwer the deſcription.——Thus, by the inveſtitures already produced, the eſtate in queſtion being inheritable only by heirs-male, no antecedent ſettlements, unleſs guarded by ſtrict prohibitory clauſes in favour of heirs of line, can in the ſmalleſt degree aid Lady Mary's pretenſions. Any exhibition, therefore, at her inſtance muſt be confined to ſuch ſettlements alone. Hence, too, with regard to thoſe writings which are condeſcended on for the purpoſe of aſcertaining the intention of Earl John in the backbond ſtipulated from Mr Roſs, the exhibition being meaſured preciſely by the intereſt of the party demanding it, muſt here be limited to ſuch as import a departure from the ancient inveſtitures, in favour of heirs general.

Lady Mary likewiſe inſiſted for production of a decreet of ſale in 1724, of the houſe and parks of Struthers, part of the eſtate of Craufurd, together with an heritable ſecurity granted over theſe ſubjects

to

to Colonel Charteris. A great deal of argument too was introduced with regard to the effect of preſcription as to the ſettlements anterior to the year 1648, and the efficacy of particular writings, ſuch as teſtaments, letters of correſpondence, declarations of truſt, &c. in regulating the ſucceſſion of landed property. This laſt, however, being conſidered as premature, was diſregarded by the Court.

A great majority of the *Judges* were of opinion, that the condeſcendence, although not accurate as to dates, was however ſufficiently ſpecial, and that the writings called for were either ſuch as might throw light on the queſtion between the parties, or belonged to Lady Mary as heir of line to her predeceſſors. No perſon, it was farther obſerved, could with propriety give his oath reſpecting the legal conſequences of the whole writings in his cuſtody. To permit, therefore, a ſuppoſed haver, without naming particular writings, to be examined in general as to his poſſeſſion of deeds of a certain effect and quality, was liable to the ſame objections with a demand for a general exhibition, which was now moſt juſtly reprobated in practice. On this ground, in the noted queſtion between Mr Scott and Lord Napier, Dict. of Deciſ. vol. 3. *voce* Exhibition, the Court refuſed to compel his Lordſhip to ſwear, whether the writings in his cuſtody imported an interruption of preſcription, or a continuation of the truſt alleged by his opponent. But when, on the other hand, particular writings were condeſcended on, to permit the holder to ſwear as to their tenor and import, by placing him in the ſituation of a judge in his own cauſe, would open a door to much prevarication and improper procedure.

Some of the *Judges*, however, were of a different opinion as to the extent of the exhibition. In every caſe, it was ſaid, a party craving exhibition was under a neceſſity to rely on the faith of the ſuppoſed haver, in whoſe power it was, if he choſe to perjure himſelf, to conceal the writings in his poſſeſſion. Little prejudice, therefore, could ariſe from the reſtriction inſiſted for on the part of the Earl of Craufurd, while a contrary practice tended to render inſecure the titles of landed property, by giving occaſion to diſputes altogether foreign to that in which the exhibition was demanded, and to claims in favour of thoſe who were no parties to the action.

The Lords, before anſwer, granted warrant for letters of incident diligence againſt havers for recovering the writings which have been mentioned.

Lord Ordinary, *Elliock*. For the Earl of Craufurd, *Solicitor-General Campbell, Mackintoſh, Wight, Sir John W. Belſches*. For Lady Mary Campbell, *Lord Advocate Dundas, Croſbie, Henry Erſkine, Alex. Fergusſon, Neil Fergusſon, Morthland, Ro. Dundas*. Clerk, *Menzies*,

C.

N° CXIX.

N° CXIX. *Auguſt* 8. 1783.

WILLIAM CLARK,

AGAINST

JOHN ROBERTSON, and others.

JURISDICTION. *Action, on a policy of inſurance, not competent before the Court of Seſſion, in the firſt inſtance.*

AN action founded on a policy of inſurance, was brought before the Court of Seſſion, in the firſt inſtance, by Clark, the inſured, againſt Robertſon, and certain other perſons, underwriters.

A doubt concerning the competency of the juriſdiction, having occurred, both parties declared their readineſs to prorogate it; and referred to the caſe of Ritchie *contra* Wilſon and Company, determined July 5. 1780, Fac. Coll.

The Lord Ordinary reported the point to the Court; and, in conſequence of the opinion delivered by their Lordſhips,

" Found, that the caſe was maritime, and therefore that it could " not, in the firſt inſtance, proceed before this Court; and therefore " diſmiſſed the action."

Lord Ordinary, *Kennet.* Act. *Morthland.* Alt. *Solicitor-General, (Campbell).*

S.

DECISIONS

OF THE

COURT OF SESSION.

N° CXX. *November* 14. 1783.

DAVID HENDERSON,

AGAINST

ROBERT CAMPBELL.

HEIR Apparent. *Though the anceſtor die in the moſt diſtant parts, no addition is to be made to the* annus deliberandi, *on account of the time elapſing between the death and the notice of it obtained by the heir.*

ROBERT CAMPBELL, reſiding in Ayrſhire, was the heir of James Campbell, who died in the Eaſt Indies. Upwards of a year after his death, but ſeveral months leſs than one from the time when the news of it were received in this country, Henderſon, a creditor of Robert, obtained a decreet of adjudication againſt him, as charged to enter heir to James. A judgment of the ſheriff, decerning in favour of the adjudger, in an action of removing from the lands adjudged, was, by bill of advocation, brought under the review of the Court; the heir complaining, that he had been denied the benefit of the *annus deliberandi.*

The Lord Ordinary refuſed the bill of advocation.

The heir reclaimed to the Court, and

Pleaded: The heirs of perſons who happen to die in the moſt diſtant parts of the world, are certainly not leſs entitled to the benefit in queſtion, than thoſe are whoſe anceſtors have never ſtirred from

home. But if, as has been done in this caſe, the *annus deliberandi* were to be computed prior to the time when notice of the predeceſſor's death ſhall have reached the heir, the conſequence, equally unavoidable and unjuſt, muſt ever be, to deprive ſuch heir, wholly or in part, of that moſt important privilege. There cannot be any foundation in law for ſo great an inconſiſtency. The *jus deliberandi*, borrowed from the Romans, is a part of our common law, and ought always to be underſtood according to its true ſpirit and meaning. In ordinary caſes, no doubt, the proper method of computation is to begin from the predeceſſor's death; and in ſome ſtatutes, as thoſe of 1503 and 1540, this is of courſe recogniſed. Where, however, without ſacrificing the privilege itſelf, ſuch a computation becomes impoſſible, law cannot but concur with reaſon in adopting a different mode. Thus, in the caſe of poſthumous heirs, the year is reckoned, not from the time of the anceſtor's death, by which means the benefit might ſeldom have its effect, but from that of the childrens birth, 28th February 1627, Livingſtone-Spottiſwoode, *voc.* Heir and Heirſhip. On the ſame principle, where ſeveral apparent heirs have happened to come in the place of one another, a full year, calculated from the period at which the ſucceſſion devolved to them reſpectively, has been allowed to each, 1ſt February 1704, Bruce *contra* Earl of Southeſk; Fountainhall. No reaſon appears, why a principle, ſo rational in itſelf, and ſo well eſtabliſhed by precedent, ought in the preſent inſtance to be diſregarded; eſpecially as the queſtion here concerns merely *probabilem cauſam litigandi*, to the effect of admitting the matter by advocation to a more perfect diſcuſſion.

Anſwered: The doctrine of *charges to enter heir* is to be ſtrictly limited by the terms of the ſtatute of 1540, c. 106. which introduced that mode of proceeding. Now that enactment expreſsly mentions "year and day *after the deceaſe* of the father or predeceſſor."

Beſides, the relaxation or extenſion of the law contended for by the heir, ſeems in itſelf altogether impracticable. For what an infinite number of periods for the deliberation of heirs would the Court have to deviſe, in order that thoſe times might correſpond to the endleſs diverſity of the diſtances from this country to all the parts of the habitable earth?

Replied: No argument from the ſtrictneſs of interpretation, belonging to ſtatutes that confer privileges, can militate againſt the heir. If the ſtatute of 1540 introduced a privilege, it was not in favour of heirs, but in direct oppoſition to them; being in behalf of creditors alone, who formerly had no means of attaching the heritage of debtors whoſe heirs remained unentered. Nor is there any difficulty in aſcertaining, either, in general, the time requiſite to obtain information from any corner of the world, or the particular fact when ſuch intelligence has been actually received; after which there is nothing farther to be required. It is not an infinite variety of different periods, but the ſingle ſpace of year and day, to which the attention of the Court will be called.

Obſerved

Obſerved on the Bench: It would be highly inexpedient and unjuſt, were the effect of the diligence of creditors to depend on the caſual circumſtance of the particular time neceſſary for communicating notice of the predeceſſor's death to the heir, whoſe place of reſidence may be unknown to the creditors.

The Court "adhered to the interlocutor of the Lord Ordinary on "the bills."

Afterwards a reclaiming petition for the heir was refuſed, without anſwers.

Lord Ordinary, *Stonefield.* For Henderſon, *G. Fergusſon.* Alt. *Croſbie, M'Cormick.*

S.

N° CXXI. *November* 18. 1783.

HENRY BLAIR,

AGAINST

JOHN BRUCE-STEWART, and CLEMENTINA STEWART, his Spouſe.

BONA FIDES,—*in the conſumption of rents, muſt be founded on probable grounds.*

THE lands of Scauſburgh, wadſetted in the year 1689 to the family of Bigton, were the ſource of continual litigation between them and the reverſers till the year 1732. At that period the eſtate of Bigton devolved to Mrs Clementina Stewart, then a minor, who, on occaſion of her marriage in 1744, diſponed her whole lands, including thoſe of Scauſburgh, to her huſband; and by him they were poſſeſſed without challenge till the year 1771. An action was then brought by Henry Blair, in which it was found, that the lands of Scauſburgh were redeemable, and in general, that the holders were accountable for the rents.

In the accounting which followed, the predeceſſors of Mrs Bruce-Stewart, who were well acquainted with the true nature of their right, could not be thought entitled to the benefit of a *bona fide* poſſeſſion. But with regard to their own poſſeſſion, that lady and her huſband

Pleaded: As *mala fides*, or the commiſſion of a wrong, is never to be preſumed; ſo there is, in this caſe, the moſt ſatisfying evidence, from the age of Mrs Bruce-Stewart when ſhe ſucceeded to the eſtate, and the

home. But if, as has been done in this caſe, the *annus deliberandi* were to be computed prior to the time when notice of the predeceſſor's death ſhall have reached the heir, the conſequence, equally unavoidable and unjuſt, muſt ever be, to deprive ſuch heir, wholly or in part, of that moſt important privilege. There cannot be any foundation in law for ſo great an inconſiſtency. The *jus deliberandi*, borrowed from the Romans, is a part of our common law, and ought always to be underſtood according to its true ſpirit and meaning. In ordinary caſes, no doubt, the proper method of computation is to begin from the predeceſſor's death; and in ſome ſtatutes, as thoſe of 1503 and 1540, this is of courſe recogniſed. Where, however, without ſacrificing the privilege itſelf, ſuch a computation becomes impoſſible, law cannot but concur with reaſon in adopting a different mode. Thus, in the caſe of poſthumous heirs, the year is reckoned, not from the time of the anceſtor's death, by which means the benefit might ſeldom have its effect, but from that of the childrens birth, 28th February 1627, Livingſtone-Spottiſwoode, *voc.* Heir and Heirſhip. On the ſame principle, where ſeveral apparent heirs have happened to come in the place of one another, a full year, calculated from the period at which the ſucceſſion devolved to them reſpectively, has been allowed to each, 1ſt February 1704, Bruce *contra* Earl of Southeſk; Fountainhall. No reaſon appears, why a principle, ſo rational in itſelf, and ſo well eſtabliſhed by precedent, ought in the preſent inſtance to be diſregarded; eſpecially as the queſtion here concerns merely *probabilem cauſam litigandi*, to the effect of admitting the matter by advocation to a more perfect diſcuſſion.

Anſwered: The doctrine of *charges to enter heir* is to be ſtrictly limited by the terms of the ſtatute of 1540, c. 106. which introduced that mode of proceeding. Now that enactment expreſsly mentions "year and day *after the deceaſe* of the father or predeceſſor."

Beſides, the relaxation or extenſion of the law contended for by the heir, ſeems in itſelf altogether impracticable. For what an infinite number of periods for the deliberation of heirs would the Court have to deviſe, in order that thoſe times might correſpond to the endleſs diverſity of the diſtances from this country to all the parts of the habitable earth?

Replied: No argument from the ſtrictneſs of interpretation, belonging to ſtatutes that confer privileges, can militate againſt the heir. If the ſtatute of 1540 introduced a privilege, it was not in favour of heirs, but in direct oppoſition to them; being in behalf of creditors alone, who formerly had no means of attaching the heritage of debtors whoſe heirs remained unentered. Nor is there any difficulty in aſcertaining, either, in general, the time requiſite to obtain information from any corner of the world, or the particular fact when ſuch intelligence has been actually received; after which there is nothing farther to be required. It is not an infinite variety of different periods, but the ſingle ſpace of year and day, to which the attention of the Court will be called.

Obſerved

Obſerved on the Bench: It would be highly inexpedient and unjuſt, were the effect of the diligence of creditors to depend on the caſual circumſtance of the particular time neceſſary for communicating notice of the predeceſſor's death to the heir, whoſe place of reſidence may be unknown to the creditors.

The Court "adhered to the interlocutor of the Lord Ordinary on "the bills."

Afterwards a reclaiming petition for the heir was refuſed, without anſwers.

Lord Ordinary, *Stonefield.* For Henderſon, *G. Fergusſon.* Alt. *Croſbie, M'Cormick.*

S.

N° CXXI. *November* 18. 1783.

HENRY BLAIR,

AGAINST

JOHN BRUCE-STEWART, and CLEMENTINA STEWART, his Spouſe.

BONA FIDES,—*in the conſumption of rents, muſt be founded on probable grounds.*

THE lands of Scauſburgh, wadſetted in the year 1689 to the family of Bigton, were the ſource of continual litigation between them and the reverſers till the year 1732. At that period the eſtate of Bigton devolved to Mrs Clementina Stewart, then a minor, who, on occaſion of her marriage in 1744, diſponed her whole lands, including thoſe of Scauſburgh, to her huſband; and by him they were poſſeſſed without challenge till the year 1771. An action was then brought by Henry Blair, in which it was found, that the lands of Scauſburgh were redeemable, and in general, that the holders were accountable for the rents.

In the accounting which followed, the predeceſſors of Mrs Bruce-Stewart, who were well acquainted with the true nature of their right, could not be thought entitled to the benefit of a *bona fide* poſſeſſion. But with regard to their own poſſeſſion, that lady and her huſband

Pleaded: As *mala fides*, or the commiſſion of a wrong, is never to be preſumed; ſo there is, in this caſe, the moſt ſatisfying evidence, from the age of Mrs Bruce-Stewart when ſhe ſucceeded to the eſtate, and the

the taciturnity of thoſe in the right of reverſion, that at no time previous to the commencement of the action in 1771, ſhe ever entertained a doubt of the juſtice of her poſſeſſion. And the plea of her huſband is yet more favourable, to whom the ſubject was transferred, in return for the proviſions ſtipulated by marriage-contract to the diſponer and her children.

Anſwered: *Bona fides*, in the conſideration of law, is not created by a mere ignorance of a better or preferable claim, but by a belief, founded on reaſonable grounds, that the ſubject was in truth the rightful property of the poſſeſſor, Erſkine, book 2. tit. 19. § 25; Bankton, book 1. tit. 8. § 12. It cannot then, with any propriety, be alleged by the defenders, to whom their obligation to account muſt have been apparent from the ſlighteſt inquiry into the nature of their right, or the circumſtances of the poſſeſſion. Nor can the caſe of the huſband be diſtinguiſhed in any reſpect from that of his wife. Even the conveyance of a ſpecial ſubject, in name of dowery, accompanied with abſolute warrandice, ought not to beſtow the privilege here inſiſted for, where the right of the original holder was manifeſtly tortious and illegal, or proceeded on titles *ex facie* ſubject to defeaſance. That however is not the point now in diſpute. In virtue of the univerſal diſpoſition, Mr Bruce-Stewart acquired right to the eſtate of Bigton, merely as it ſtood in the diſponer, ſubject to every diſability or exception which could have been formerly urged.

Several particulars were ſtated by the purſuer, tending to ſhow the defenders private knowledge of the exceptionable nature of their poſſeſſion; but the judgment of the Court ſeemed to reſt on the general principle, that the privilege here contended for, was due to thoſe only who could qualify probable reaſons for having conſidered the ſubject as their own. A ſeparate queſtion, how far Mr Bruce-Stewart, as his wife's univerſal diſponee, was liable, perſonally, beyond the extent of his own intromiſſions, likewiſe occurred, but was not determined.

The Lords "repelled the defence of a *bona fide* poſſeſſion pleaded by "the defenders during the whole period ſince the wadſet granted to "Laurence Stewart of Bigton upon the 23d of Auguſt 1689, to the "preſent time: But remitted to the Lord Ordinary to hear parties "procurators, how far the defender John Bruce-Stewart is perſonally "liable to account for the rents of the ſubjects in queſtion, prior to "the date of his own poſſeſſion, in virtue of his contract of marriage with Clementina Stewart."

Lord Ordinary, *Kennet.* Act. *Abercromby.* Alt. *Hay, Honyman.* Clerk, *Menzies.*

C.

N° CXXII.

N° CXXII. *November* 19. 1783.

Mrs RACHAEL SPOTTISWOODE,

AGAINST

JAMES ROBERTSON-BARCLAY.

BANKRUPT—*Act* 1696, *c.* 5. *A precept of ſeiſin granted by a bankrupt, in implement of marriage-articles long prior to the bankruptcy, falls not under the ſanction of the ſtatute* 1696.

IN 1772, by marriage-articles entered into between Archibald Roberton of Bedlay and Miſs Spottiſwoode, he obliged himſelf to infeft and ſeiſe her "in an annuity or jointure of L. 150;" but for ſeveral years he delayed to fulfil that obligation. On 9th July 1779 he became bankrupt, according to the deſcription of the ſtatute of 1696, c. 5.; and it was not until the 24th day of the ſame month, that in implement of the marriage-articles, he executed a bond of annuity, containing procuratory of reſignation and precept of ſeiſin. Still, however, failing to deliver, or to exhibit this bond, diligence by horning and inhibition was uſed, and a proceſs of adjudication in implement inſtituted againſt him, in which a decree would have been obtained, had he not at length made delivery of the bond; upon which, immediately after, (on 31ſt January 1780) Mrs Roberton was infeft.

In the ranking of Mr Roberton's creditors, Mrs Roberton claimed a preference under thoſe titles; but the other creditors objected, that, by the operation of the above mentioned ſtatute, they were rendered void and null; and in ſupport of the objection,

Pleaded: The bond in queſtion, to uſe the very terms of the ſtatute, having been "granted by the bankrupt, at or after his becoming "ſuch, in favour of (Mrs Roberton) a creditor (by the marriage-ar-"ticles) either for her ſatisfaction or *farther ſecurity*, in preference to "other creditors, is void and null." For it is of no conſequence, that by this bond a ſpecific obligation has been implemented; agreeably to the deciſion in the caſe of Beg *contra* Peat, in the ranking of Clyde's creditors in 1769; and to the argument of Lord Bankton, (b. 1. tit. 10. § 104.) relative to the act of parliament of 1621. Were the oppoſite principle to prevail, it would in a great meaſure fruſtrate a ſtatute, hitherto eſteemed ſo beneficial. One object of it was, to hinder debtors, on the eve of bankruptcy, or after it, from withdrawing from their creditors, by partial deeds of preference, thoſe eſtates the unincumbered appearance of which had allured them. But this object could never be obtained, if the production of an anterior latent obligation were ſufficient to give validity to ſuch preferences.

Indeed the ſtatute has ſpecially guarded againſt that device, by enacting, that in this matter the date of infeftment is to be held as that of its warrant; than which ſurely no obligation can be more ſpecifical.

Anſwered: The ſpirit of the ſtatute in queſtion, apparent on compariſon with the prior enactment in 1621, unites with its words to ſhew, that it was framed to prevent undue preferences among ſuch creditors only as ſtand in the ſame ſituation. But the fulfilling of a preciſe obligation, *ad factum præſtandum*, does not produce an undue preference over a creditor in whoſe favour no ſuch right has been granted. Nor is the creditor really hurt by that voluntary act; ſince adjudications in implement, with which other adjudications cannot be ranked *pari paſſu*, would unavoidably have the ſame effect.

Were the intendment of this ſtatute leſs conſonant to its terms, the ſtrict interpretation due to correctory enactments would confine itſelf to the latter; of which the ſtrongeſt poſſible inſtance occurs in the caſe of payments made by bankrupts to favourite creditors; which, though clearly reprobated by the ſpirit of a law directed againſt fraud, is conſtrued as not falling under the expreſſion of that enactment.

The object mentioned on the other ſide ſeems erroneouſly aſſigned to the ſtatute of 1696. Had it been a true one, the antecedent period defined for the benefit of creditors would have been computed, not from the date of the infeftment, but from that of its regiſtration, which only, of the two, is an act of a public nature, or calculated for the information of creditors; whereas, ſince regiſtration may, as was ſtrongly exemplified in the late caſe of Syme's Creditors *contra* Maxwell Conſteble *, be poſtponed till the *fifty-ninth* day after ſeiſin, the *ſixty days* ſubſequent to infeftment may very readily elapſe before it is poſſible for a creditor to avail himſelf of the ſtatute. An effect which it has ſo little tendency to produce, ſhould not be ſuppoſed to have been intended by any enactment. The regulation on the other hand, reſpecting the conſtructive date of the warrant of ſeiſin, probably originated from a ſuſpicion of fraudulent antedating.—This doctrine is confirmed by the deciſion in the caſe of Houſton and Company *contra* Stewarts, 20th February 1772, Fac. Coll. That of Clyde's Creditors was determined on a ſpecialty reſulting from fraud; for which reaſon it had no influence on the ſucceeding judgment now quoted.

It is moreover to be remarked, that Mrs Roberton not only might have ſecured herſelf by adjudging in implement of her marriage-articles, but that her huſband's ultimately complying with her legal demand, was the only thing which prevented the completion of that legal ſecurity already begun. If, then, her preſent plea ſhould not be admitted, the loſs of her jointure would be a truly ſingular effect of obſtinacy ceaſing on the one hand, and a litigation on the other terminating when it had become uſeleſs.

The Lord Ordinary reported the cauſe to the Court, when it was

Obſerved on the Bench: An action of reduction founded on the ſtatute of 1696, can extend no farther than the like action inſtituted *ex capite*

* *Vid.* p. 117.

capite lecti, or *ex capite inhibitionis;* in neither of which caſes could the deed in queſtion have been challenged.

" The Lords repelled the objection ſtated to the intereſt produced " for Mrs Rachael Spottiſwoode."

The creditors reclaimed, the Court being divided in opinion; and anſwers to their petition having been put in, a hearing in preſence was appointed. But in the meantime the matter in diſpute was compromiſed by the parties.

Reporter, *Lord Ankerville.* For Mrs Roberton, *Solicitor General (Wight), I. Campbell.* Alt. *C. Hay.* Clerk, *Home.*

S.

N° CXXIII. *November* 19. 1783.

JAMES ROBERTSON-BARCLAY,

AGAINST

WILLIAM LENNOX.

BANKRUPT.—*Act* 1696. *Infeftment is reducible under act* 1696, *though the warrant be anterior to the right of the creditor challenging.*

MR Roberton of Bedlay, in July 1778, granted an heritable bond to Mr Lennox of Woodhead, a creditor of his. Some time afterwards, Mr Roberton contracted debts to Mr Robertſon-Barclay, and others.

Mr Lennox did not take infeftment on his ſecurity, till 28th May 1779, and within leſs than *ſixty* days from that date, Mr Roberton was rendered a *notour* bankrupt.

In the ranking of Mr Roberton's creditors, Mr Robertſon-Barclay

Objected to Mr Lennox's intereſt: The bond and infeftment fall under the ſanction of the ſtatute of 1696, and are null; the latter having been taken within *ſixty* days of the granter's bankruptcy, as deſcribed in that ſtatute. For, to uſe the words of the law, " all diſpoſitions, " heritable bonds, or other heritable rights, whereupon infeftment " may follow, granted by the bankrupts, ſhall only be reckoned, as to " this caſe of bankrupt, to be of the date of the ſeiſin lawfully taken " thereon." In the caſe of *nova debita*, it is true, the Court have of late determined, that ſeiſin following within the *ſixty* days on a ſecurity prior to that period is valid; but the *novum debitum* would have equally ſupported the infeftment, though the ſecurity itſelf had been poſterior to the commencement of the ſtatutory ſpace: And thus the diſtinction

distinction of that case from the present is apparent. Nor is it of more importance in this argument, that the debt of the creditor challenging had not been contracted when the security was given; the enactment now recited being expressly calculated to guard creditors from the effect of latent rights, the publication of which, in due time, by infeftment, would have apprised them of their danger.

Answered: The act of parliament in question, as being of a correctory nature, ought to be interpreted with strictness. Its declared purpose is, to protect creditors "against fraudful alienations made in "their prejudice;" a description not at all applicable to deeds done before their debts existed. If then the statute in general have no relation to such anterior alienations or securities, it is plain that the clause above quoted is to be understood only in reference to those deeds which are subsequent to the right of the creditor who brings the challenge. The statute, as was shewn in the case of Mrs Roberton, is not calculated, nor was it designed, to protect creditors against latency; but if its tendency had been such, *nova debita*, as well as earlier debts, would have fallen under it. Accordingly the contrary doctrine is not supported by any decision of the Court.

The Lord Ordinary reported this question to the Court, when

The Lords, disregarding the distinction pleaded by Mr Lennox, "sustained the objection to the claim of preference made upon the "heritable bond of relief in his favour, so far as the debts of the "objecting creditors were contracted prior *to the date of the seisin.*"

Reporter, *Lord Ankerville.* For Mr Lennox, *Il. Campbell.*
Alt. *C. Hay.* Clerk, *Home.*

S.

N° CXXIV. *28th November* 1783.

WILLIAM KEAY,

AGAINST

ROBERT YOUNG.

PERICULUM.—POLICY OF INSURANCE.—*Incomplete, though not fraudulent information on the part of the insured, vacates the policy.*

BY a letter, dated at Elsineur on 9th August 1780, William Keay directed his correspondent at Borrowstounness, to make insurance of his ship and cargo from Elsineur to Leith, and mentioned his purpose of sailing *that evening.*

This

On 26th Auguſt, this letter, in courſe of poſt, reached the correſpondent, who, on 27th, upon the inſurance being made by Robert Young, mentioned to him the time when the letter was received, and that Keay's intention was to ſail *immediately*, but omitted to inform him of the particular day ſpecified in the letter.

The ſhip having been taken, and an action brought for the inſured values, the underwriter

Pleaded in defence: It is the indiſpenſable duty of the inſured, to communicate every circumſtance which is material in eſtimating the riſk, and at the ſame time cannot be known to the underwriter from other ſources of intelligence; Fac. Coll. 19th January 1779, Stewart *contra* Moriſon. Although the keeping back of ſuch a circumſtance ſhould happen through miſtake, without any fraudulent intention, yet ſtill the underwriter is deceived, and the policy is void; becauſe the riſk run is really different from the riſk underſtood, and intended to be run, when the agreement was made; Burrow's Reports, p. 1909. Here then the policy in queſtion was eſſentially defective. Had it been mentioned that the veſſel was to ſail on the 9th day of Auguſt, it muſt on the 27th have been reckoned a miſſing ſhip, which few underwriters would have ventured to inſure.

Anſwered: The preciſe period of the ſhip's departure is not ſaid to have been fraudulently concealed; nor was the intimation of that circumſtance neceſſary. The inſurer had no reaſon to imagine that the orders to procure inſurance had been conveyed in a manner more expeditious than uſual. And from the eſtabliſhed intercourſe by poſt between the towns on the Baltic and Scotland, he could not be ignorant, that a letter received on the 26th day at Borrowſtounneſs could not have been written at Elſineur later than the beginning of the month. At all events, the defect in his information, which originated entirely from his own neglect in not making a further enquiry, is imputable to himſelf alone.

At firſt the Lord Ordinary aſſoilzied the defender, "in reſpect "proper information was not given."

Afterwards, on adviſing a repreſentation for the purſuer, with anſwers for the defender, his Lordſhip recalled that judgment, and found the defender liable in the inſured values, "in reſpect there "was no fraudulent concealment of any circumſtance of hazard, in "order to deceive the underwriter."

The defender reclaimed; and the petition being followed with anſwers, the Lords altered the Lord Ordinary's interlocutor; thus returning to the judgment firſt given.

Lord Ordinary, *Elliock.* Act. *Rolland.* Alt. *Blair.* Clerk, *Robinſon.*

C.

N° CXXV. *November* 20. 1783.

RICHARDSON and Company.

AGAINST

STONER, HUNTER, and KER.

EXERCITOR.—*A purchaſer from a ſhipmaſter, of a cargo which the purchaſer knew had not arrived at the place of its deſtination, is liable to the owners in damages.*

IN the end of the year 1776, Meſſ. Richardſon and Company of Perth, freighted a ſhip to carry a cargo of ſalmon to the market of Venice. The veſſel having met with unfavourable weather, had reached the coaſt of Spain only upon 19th February 1777. On that day ſhe was attacked by a violent ſtorm, which rendered it neceſſary to throw overboard a part of her cargo, and immediately to make for the neareſt port, which was that of St Lucar. At that place, having at length refitted his veſſel, the ſhipmaſter, doubtful concerning his future conduct, ſought the direction of Meſſ. Stoner and Company, a reſpectable mercantile houſe there, to whom he ſhowed his inſtructions concerning the deſtination of the voyage. The advice of thoſe gentlemen was, rather to diſpoſe of the cargo in Cadiz, though at an under value, than by proceeding at ſo late a period to Venice, to run the hazard of loſing the benefit of the ſeaſon of Lent. They likewiſe offered to execute the ſale on his commiſſion in quality of factors, which they afterwards did; and in their whole proceeding they ſeemed to have conſidered themſelves as conferring a benefit on the Scottiſh merchants.

The price procured at Cadiz being greatly inferior to that which was expected to be obtained in the market of Venice, Richardſon and Company, on account of that interference, inſtituted, in the High Court of Admiralty, an action of damages againſt Stoner and Company, in which the Judge-Admiral pronounced a decree in favour of the latter. That judgment having been brought by proceſs of reduction under the review of the Court of Seſſion, Richardſon and Company, the purſuers

Pleaded: Our property has been taken from us without our conſent, and the defenders have done this wrong. Perhaps they had not a fraudulent deſign; but their conduct muſt then have been fooliſh in a high degree. They knew the deſtination of the veſſel, for they had read the inſtructions given to the ſhipmaſter; and as they ought not to have been ignorant that ſhipmaſters, whoſe office is confined to navigation alone, and whoſe ſole official relation is to the owners of the ſhip, not the proprietors of the cargo, have not the powers

powers of a ſupercargo, to authoriſe their intermeddling with the goods on board; this ſhipmaſter's conſent will not juſtify ſo illegal an act; *Voet. Comm. ad tit. D. De exercit. act.; Heinec. Faſcicul. Script. De jur. naut. et maritim. cap.* 15. The purſuers therefore ſeek reparation of the wrong reſulting to them, not merely from the improper advice, but from the actual deed of the defenders.

Anſwered: The fairneſs of the intention which actuated the defenders is as indiſputable as the maxim, that "*conſilii non fraudulenti nulla* "*eſt obligatio.*" Though by an unauthoriſed conduct they had occaſioned damage to the purſuers, their *bona fides* is ſuch as in equity would have ſcreened them from making reparation. Princip. of Eq. b. 3. c. 2. p. 201. In fact, they proceeded not without ſufficient authority. The appointment of a ſupercargo, it is true, muſt free a ſhipmaſter from the charge of his loading; but to ſuppoſe that, where there is no ſupercargo, the maſter ought in all events to keep himſelf at a diſtance from the goods, whatever loſs this ſhould produce to the owners, is an idea that in itſelf ſeems ridiculous, and certainly is not recogniſed by mercantile or maritime law, which would even permit a ſhipmaſter to relieve himſelf of an exigency, by ſelling the goods on board; Molloy, b. 2. chap. 1. § 4. chap. 2. § 13, 14, 16.; Laws of Oleron, chap. 22.; Magens on Inſurances, art. 264. The interference then of the defenders, in its motive ſo unexceptionable, is likewiſe ſtrictly to be juſtified from the powers of the ſhipmaſter.

The Lord Ordinary "found, that the defenders having, without "any warrant or authority, indeed contrary to the orders of the pur- "ſuers, which they were well informed of, intromitted with and "diſpoſed upon the cargo of ſalmon aforeſaid, belonging to the pur- "ſuers, are liable in payment to the purſuers of the value of ſaid "cargo of ſalmon ſo intromitted with by them, at the price the ſame "would have ſold for at Venice, the port of deſtination."

The defenders having reclaimed to the Court, the Lords, "on "adviſing their petition, with anſwers, replies, and duplies, adhered "to the interlocutor of the Lord Ordinary."

Another reclaiming petition was preferred by the defenders, and anſwered by the purſuers, when the Court "altered their former "interlocutor, and aſſoilzied the defenders."

The purſuers then put in a reclaiming petition, upon adviſing which with the anſwers, the Lords having departed from the laſt mentioned judgment, returned again to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Elliock.* Act. *Mackintoſh, Wight.* Alt. *J. Fergusſon, H. Dundas, Fraſer-Tytler.* Clerk, *Home.*

S.

N° CXXVI.

N° CXXVI. *November* 20. 1783.

ARCHIBALD BAIN,

AGAINST

GEORGE KIPPEN.

PERICULUM.—POLICY OF INSURANCE.—*Concealment of the deſtination of a ſhip voids the inſurance, though the loſs ſhould happen prior to actual deviation from the voyage ſpecified to the inſurer.*

KIPPEN made inſurance for Bain upon a veſſel "at and from "Rothſay, in the frith of Clyde, to the Iſle of Man, and from "thence to the Broomielaw of Glaſgow." There afterwards occurred reaſon to apprehend that her deſtination really was to *fiſh* off the Iſle of Man; an adventure attended with more hazard, and entitling the inſurer to a higher premium.

The ſhip proceeded from Rothſay in the iſland of Bute, on her voyage towards the Iſle of Man; but having been, by ſtreſs of weather, driven back to the former iſland, ſhe was there ſtranded and wrecked.

Bain having ſued Kippen for the inſured value before the High Admiral Court, the cauſe was thence, at the defender's inſtance, removed into the Court of Seſſion.

Pleaded for the defender: The voyage for which the veſſel was deſtined being different from that ſpecified in the inſurance, no action can lie on the policy. *Conſenſus in idem placitum*, is eſſential to every contract; but whatever may have been the object of the purſuer, a *fiſhing* voyage, ſo different from that deſcribed, was not in the view of the defender, who therefore could not contract, nor incur any obligation with reſpect to it.—Yet this perhaps is not the ſtrongeſt aſpect of the cauſe. By concealing his purpoſe of ſetting out his veſſel on a fiſhing adventure, under the falſe deſcription of another voyage, accompanied with much leſs riſk, the purſuer was committing a fraudulent act; and, *dolus dans cauſam contractui, reddit contractum nullum.* If then no obligation could thence ariſe againſt the defender, it is of no conſequence to enquire in what manner the loſs in queſtion occurred, or whether it happened while the courſe of the voyage deſcribed coincided with, or deviated from that intended and concealed. On this principle the Court decided in the caſe of Buchanans *contra* Hunter-Blair, 15th July 1779, Fac. Coll.

Anſwered: It is not denied by the defender, that the veſſel was wrecked in the courſe of that very voyage which he acknowledges himſelf

himſelf to have covered by his inſurance. " The riſk then actually " run was preciſely that underſtood by him to be run," and that on account of which he received his premium: Nor can any thing be more idle than to talk of a mere unexecuted deſign of running a different riſk. Nay, of an actual deviation the effect could not have been to hurt the defender, ſince it would inſtantly have relieved him from his obligation, whilſt it left him in poſſeſſion of his premium.

The Lords " aſſoilzied the defender, by ſuſpending the letters *ſim-* " *pliciter.*"

In a reclaiming petition, the purſuer having offered to prove, that the deſtined voyage was not for the purpoſe of fiſhing, but truly ſuch as was deſcribed to the defender, the Court allowed the proof to be adduced.

Lord Ordinary, *Braxfield.* Act. *Cha. Hay.* Alt. *Rolland.* Clerk, *Home.*

S.

N° CXXVII. *November* 21. 1783.

PATRICK MACQUEEN, and his Spouſe,

AGAINST

The Reverend Mr JOHN GRANT.

JURISDICTION. *Injury by a miniſter, how far actionable in the civil courts.*

IN the action of damages, brought by Patrick Macqueen and his ſpouſe, againſt Mr Grant, their pariſh-miniſter, on account of his having, from motives of private pique and reſentment, refuſed them tokens of admiſſion to the Lord's Supper; the Court, 18th July 1781, " Found, that the defender having acted in that matter in his " eccleſiaſtical capacity, was not amenable to the civil courts of " law."

The purſuers then amended their libel, and offered to prove, " that " the defender had ſaid to many perſons, that they had been guilty " of perjury at a circuit-court at Inverneſs; and that they were held " as perjured perſons by thoſe in court, and alſo by the Judge and

" Deputy-Advocate; and likewiſe that the defender had ſaid, it " was on that account he had refuſed them tokens to the Lord's " Table."

The Court thought the facts thus qualified injurious and actionable. To refuſe admiſſion to the ordinances of religion, or to give reaſons for that procedure, either in the church-courts or in private admonition to the parties themſelves, was a matter merely eccleſiaſtical; but to propagate in public companies a ſtory highly prejudicial to the reputation of a pariſhioner, or even to give it as a reaſon for his conduct, could not be juſtified by the character of a miniſter.

A proof was allowed; on adviſing which the Lords found, " That " the purſuers have proved the facts ſet forth in their amended li- " bel, and that the defender was liable to them in damages and ex- " pences."

Lord Ordinary, *Kennet.*
Alt. *Ilay Campbell, Robertſon.*
Act. *Croſbie, Elphinſton, James Grant.*
Clerk, *Menzies.*

C.

N° CXXVIII. *November* 21. 1783.

MORTON and Company,

AGAINST

JAMES COLQUHOUN and GEORGE MACFARLANE.

REMOVING.—*Caution for violent profits,—comprehends reparation of damage done to the ſubjects ſet.*

COLQUHOUN and MACFARLANE having become cautioners to Morton and Company " for the violent profits" for which a tackſman might be found liable in conſequence of his refuſal to remove, were ſued for reparation of the damage done to certain ſubjects of the tack: in oppoſition to which claim they contended, That though by the above mentioned terms of their obligation, they were indeed bound to the extent of the higheſt profits which could ariſe out of the ſubjects ſet, yet their obligation did not include the repairing of ſuch damage.

The Lord Ordinary repelled the defence; and, on adviſing a reclaiming petition, with anſwers,

The

The Lords adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Kennet.* Act. *Honyman.* Alt. *Craig.* Clerk, *Campbell.*

S.

N° CXXIX. *November* 26. 1783.

ALEXANDER, &c. WILSONS,

AGAINST

WILLIAM WILSON.

PRESUMPTION.—*Implied diſcharge.*

AN elder brother had intromitted with the whole effects of his father on his becoming ſuperannuated, and incapable of attending to his affairs. Thirteen years afterwards the repreſentative of the elder brother was ſued in an action, at the inſtance of the younger children, for rendering to them an equal diſtribution of thoſe effects.

The Lord Ordinary having found the defender liable to account, he reclaimed to the Court; when it was

Obſerved on the Bench: To admit claims of this ſort, eſpecially among country-people, at ſo great a diſtance of time from the predeceſſor's death, would be the ſource of much injuſtice. The reaſonable preſumption is, that the funds have been properly applied by the elder brother.

Upon adviſing the petition for the defender, with anſwers for the purſuers, the Lords altered the Lord Ordinary's judgment, and aſſoilzied.

Lord Ordinary, *Alva.* Act. *Ro. Craigie.* Alt. Lord Advocate *Erſkine, Baillie.*
Menzies, Clerk.

C.

N° CXXX.

N° CXXX. *November* 28. 1783.

The APPARENT HEIR of JOHN PORTEOUS of Glenkirk,

AGAINST

Sir JAMES NASMITH.

PENALTIES.—*exorbitant, when exceeding a fifth part of the principal ſums.*

ADJUDICATION,—*for termly penalties.*

THE grandfather of Sir James Naſmith was creditor to John Porteous of Glenkirk in an heritable bond for 12,000 merks. The penalty annexed to the not payment of the principal ſum uſually called the liquidate penalty, was only 2000 merks; but that relating to the intereſt, which was to be paid half-yearly, or what is ſtyled the termly penalty, amounted to 100 merks, being more than a fourth of the termly payment, even when the rate of intereſt was ſix per cent.

No annualrents having been paid for ſeveral years, an adjudication was deduced, in the year 1716, againſt the lands of Glenkirk, for the principal ſum; for the annualrents; for the liquidate penalty; and alſo for the termly penalties.

In a challenge of this adjudication, the apparent heir of John Porteous

Pleaded: The termly penalties here ſtipulated, exceeding a fifth part of the ſums the payment of which they were meant to enforce, were altogether exorbitant and illegal. They were likewiſe improperly included in the adjudication. It is the purpoſe of the liquidate penalties in an heritable bond, to indemnify the creditor of the expence he may be at by uſing diligence againſt the lands, while thoſe annexed to the termly failures are ſolely calculated to defray the expences incurred in recovering the annualrents out of the yearly produce of the eſtate. When a creditor therefore executes a poinding of the ground for the annualrents, he is entitled to the termly penalties, but cannot include in that diligence the ſums ſtipulated in name of liquidate penalty. And in like manner, when proceeding to attach the eſtate itſelf for payment of his debt, he muſt reſt ſatisfied with the liquidate penalty, as fully adequate to his indemnification; Stair, 20th July 1678, Morrice *contra* Orrock; 15th November 1771, Park *contra* Craig.

Anſwered: The penalties in a bond of borrowed money are to be viewed, not merely as the means of recovering the expence of diligence

gence uſed for attaching the eſtate of a debtor, but as a liquidation of the whole damage ariſing to the creditor from delay in payment. Being no where regulated by ſtatute, their extent will naturally be proportioned to the intereſt of the creditor in his debtor's punctuality. Nor can thoſe ſtipulated on account of the irregular payment of intereſt be the leſs due, becauſe, through the inſolvency of his debtor, the creditor has been obliged to follow legal meaſures in order to recover the principal ſum itſelf.

Neither would theſe objections, though well founded, be altogether fatal to the diligence. They would not even deprive the creditor of his liquidate penalty, which in this inſtance was uncommonly moderate. An adjudication is no longer like the ancient appriſings, a penal diligence; it has been converted, by the modern practice, into a mere ſecurity for what is juſtly due. And to that extent the attachment is ſupported in equity, eſpecially in a queſtion with the heir of the debtor, notwithſtanding any defect, ariſing either from an informality in its execution, or from an undue charge againſt the debtor; Dict. of Deciſ. *voce* Adjudication; Kilkerran, 6th Nov. 1747, Creditors of Roſs *contra* Balnagowan, and Davidſon. In this inſtance, therefore, it would be ſuſtained as a ſecurity for the principal ſum, the annualrents, and liquidate penalty, accumulated at the date of the decreet of adjudication.

The Lords being unanimouſly of opinion, that this adjudication was exceptionable in both reſpects, the only queſtion was, to what degree it ought to be reſtricted? By one judgment, it was ſuſtained as a ſecurity for the principal ſum, annualrents, and liquidate penalties. But upon adviſing a reclaiming petition, with anſwers, the Lords, moved chiefly by an appearance of rigour in the meaſures which had been purſued in this caſe by the creditor, found, " That " the adjudication could only ſubſiſt as a ſecurity for the principal " ſum contained in the bond, and intereſt due thereon, to be accu- " mulated at the date of the decreet."

Lord Reporter, *Weſthall.* For Sir James Naſmith, *Hay, Honyman, Mark Pringle.*
For the apparent Heir, *Rolland, David Williamſon.* Clerk, *Home.*

C.

N° CXXXI. *December* 2. 1783.

TRUSTEES of JAMES MACDOWAL,

AGAINST

RICHARD CLEGHORN.

THIRLAGE,—*loſt* non utendo. *Local ſituation within a barony ſubjects not to thirlage, without preſcriptive poſſeſſion.*

MR MACDOWAL was proprietor of the mills called Canonmills, thoſe of the barony of Broughton; and Mr Cleghorn proprietor of ſome lands ſituated within that barony, and on which a brewery had been erected. No aſtriction, however, to thoſe mills was expreſſed in the title-deeds of the lands; and there appeared not reſpecting it to have been any poſſeſſion of thirlage.

An action of declarator having been inſtituted againſt Cleghorn, founded on an alleged preſumption of ſervitude, ariſing from the local ſituation of the tenement,

The Court were of opinion, That though the thirlage had been proved to have once exiſted, an immunity would have been eſtabliſhed by diſuſe continued beyond the years of preſcription.

It was further obſerved, That the effect of the connection between lands contained in a barony, and the mill of the barony, is only to afford a title for preſcription of thirlage, and not of itſelf to conſtitute that ſervitude.

The Lord Ordinary having decerned in the declarator againſt the defender,

The Lords "altered that interlocutor; and in reſpect it was not "alleged or proved, that the barony-mill had been uſed by the de- "fender, or his authors, within the years of preſcription, aſſoilzied "the defender."

Lord Ordinary, *Monboddo.* Act. *Elphinſton.* Alt. *Alex. Fergusſon.* Clerk, *Home.*

S.

N. B. The like judgment was given on the ſame day, in a ſimilar queſtion, between the above purſuers and William Cleghorn.

N° CXXXII.

N° CXXXII. *December* 2. 1783.

JAMES WILSON, and others,

AGAINST

JOHN WORDIE, and others,

PERICULUM. POLICY OF INSURANCE. Valued Policy. *Inſurers are liable for the eſtimated value, though beyond the true, if the eſtimate be made without fraud.*

WILSON, and other owners of a private ſhip of war, having got notice that ſhe had captured a Spaniſh merchantman, made inſurance upon the prize; which, in the policy opened by Wordie and others, the underwriters, was valued at L. 20,000, including 20,700 dollars in ſpecie. The veſſel was retaken by a French privateer, but not before the Scottiſh captors had ſent aſhore 4200 dollars, which indeed appear to have been nearly the amount of the ſpecie found on board of the prize.

An action inſtituted in the Court of Admiralty, by the inſured againſt the underwriters, having been brought by advocation and reduction before the Court of Seſſion, it was

Pleaded for the defenders: It is an eſtabliſhed maxim reſpecting inſurances, that the concealment or miſrepreſentation, even by miſtake, of any ſuch important fact or circumſtance as may make "the riſk "really run different from that underſtood and intended to be run "at the time of the agreement," renders the policy void. The over-valuation in this caſe, ſo undeniably, eſpecially as to the dollars, evidently increaſed the diſadvantage of the inſurers ſituation, or the riſk which they run, and ought therefore to prove fatal to the claim of the purſuers; Weſkett's Digeſt of Inſurance-laws, p. 28.

But though the policy were not thus to be annulled *in totum*, it ought at leaſt, in conſideration of its object, to be reſtricted to the loſs truly ſuſtained. Inſurance is a contract of indemnity; and where no damage can poſſibly ariſe, or ſo far as no ſubject exiſts on which it may be incurred, there is no room for any obligation. Hence the defenders are liable according to the true extent only of the loſs in queſtion, notwithſtanding the over-valuation in the policy. For "no man ſhould be allowed to avail himſelf of "having over-valued;" Burrow's Reports, vol. 2. p. 1198, Hamilton *verſus* Mendes; ibid. p. 1167, Lewis *verſus* Rucker. See Ordinances of France, and Coningſberg ap. Weſkett's Digeſt, p. 309.; and of Amſterdam, in Magen. vol. 2. p. 136. See alſo Reſolutions on this ſubject,

ject, of a Committee of the Houſe of Commons in 1747. If the error has ariſen, not by miſapprehenſion, but from fraudulent deſign, then is the contract totally vitiated in reſpect of the inſured, whoſe crime falls under the cogniſance of the law, while the inſurer continues entitled to his full premium; Weſkett *ut ſupra*. Even wager-policies, as they are ſtyled, are expreſsly prohibited by act 19. of George II. The valuing of policies nevertheleſs is by no means uſeleſs, as it imports an admiſſion on the part of the inſurer, which ſuperſedes the neceſſity of proof by the inſured; though it is evident that the inſurer is not thereby precluded from detecting an erroneous valuation by a proof to be adduced by himſelf.

Anſwered: The very purpoſe of valued policies is to remedy the uncertainty of real amount, which on many occaſions is unavoidable, and almoſt always attends caſes of prize like the preſent. It behoves the inſured indeed, in ſpecifying the value, to be free from any fraudulent deſign. But though an over-valuation ſhould happen, if *bona fide* made, it will ſtand good. The ſtatute of George II. was directed only againſt thoſe inſurances in which the inſured has no true intereſt; but enacts nothing with reſpect to caſes in which he holds a ſubſtantial property, though of leſs value than that rated in the policy; Burrow, vol. 2. p. 1171.

Some of the judges were of opinion, That the ſole effect of the valuation was to create a preſumption, which however might be overcome by proof; but the majority adopted the argument of the purſuers.

The Lord Ordinary reported the cauſe, when

"The Lords found the underwriters liable in terms of the policy "of inſurance underwritten by them."

In a reclaiming petition the underwriters argued thus: Suppoſe the full ſpecified number of dollars, viz. 20,700, to have been on board, and all ſaved, then ſurely to that extent no claim could lie againſt the underwriters. Now in fact the whole ſpecie really on board, viz. 4200 dollars, was ſaved; and what difference could it make, that an additional number, which never at all exiſted, had been ſtated by miſtake? Did that create any loſs?

On adviſing this petition, with anſwers, in which the former argument of *bona fides* ſupporting the valuation was again urged,

The Lords adhered to their foregoing judgment.

Lord Reporter, *Hailes.* Clerk, *Home.* Act. *I. Campbell, C. Boſwell.* Alt. *Blair.*

S.

N° CXXXII.

N° CXXXXIII. *December* 4. 1783.

The BAKERS of EDINBURGH,

AGAINST

WILLIAM DOWIE.

BURGH-ROYAL. *Exclusive privileges of the incorporated crafts not confined to* manufacturing *alone.*

WILLIAM DOWIE, who, though a burgess, was not a member of the corporation of bakers of Edinburgh, kept a shop in that city, for the purpose of selling bread of all kinds, which he baked in a workhouse situated without the city's liberties.

The corporation of bakers considering this practice as an encroachment on their privileges, brought it under challenge in a declaratory action.

Pleaded in defence: The privileges conferred on this corporation, like those of every other, are confined to *manufacturing* alone. Accordingly the bakers of Musselburgh, Dalkeith, and other neighbouring towns, are in use, not only on market-days, but at all times, to import bread manufactured by them; also the grocers, and other shopkeepers in Edinburgh, sell bread, and other articles, bought from unfreemen bakers; and, with regard to other trades, the haberdashers, though not members of the hatter or weaver corporations, are in the practice of selling hats, and linen and woollen stuffs of all kinds. On the same principle, in an action instituted by the coppersmiths of Edinburgh against James Aberdour, the Lords found the defender entitled to import and sell coppersmith work, if not manufactured within the royalty; 6th August 1768.

Answered: It is indeed inherent in the notion of a free market, that on the days appointed for that purpose, not only burgesses, but unfreemen, may dispose of their several manufactures. The inhabitants of royal burghs too, in virtue of the act 1592, c. 154. may import for their own use merchandise of every sort; a liberty perhaps frequently employed to cover the introduction, by unfreemen, of articles not previously ordered; and merchants, whose principal object of trade are commodities not subject to the corporation-privileges, may retail in their shops particular articles usually prepared by the members of corporations, 25th November 1749, Hat *contra* the Candlemakers of Edinburgh; a practice which has been legitimated by long usage, and does not materially infringe on the rights

of corporations. But from theſe exceptions to the general law it ſurely will not follow, that a burgeſs, by merely keeping his work-ſhop without the town's precinct, may exerciſe the occupations peculiar to the members of the incorporated trades, which would at once reduce the eſtabliſhed rights of theſe communities to the inſignificant advantage of having a work-ſhop within the burgh. The caſe of Aberdour was a ſingular one; the trade of a hammerman, which he was intitled to purſue, being ſo interwoven with that of a copper-ſmith, that a diſtinction was impracticable.

The Lord Ordinary repelled the defences; and to this judgment the Lords adhered, upon adviſing a reclaiming petition for William Dowie, with anſwers for the bakers.

Lord Ordinary, *Braxfield.* Act. *Ro. Sinclair.* Alt. *Little.* Clerk, *Home.*

C.

N° CXXXIV. *December* 4. 1783.

The CREDITORS of ROBERT CUMING,

AGAINST

JEAN MACONOCHIE.

SERVICE OF HEIRS.—*Neceſſity of a general ſervice, in order to tranſmit perſonal rights in burgage tenements.*

ROBERT CUMING diſponed a houſe in the town of Edinburgh, with an unexecuted procuratory from the perſon laſt infeft, "to "James Beveridge, and Grizel Chieſly, his ſpouſe, and longeſt liver "of them two, in conjunct fee and liferent, for the ſaid Grizel "Chieſly her liferent-uſe allenarly; and at and after the deceaſe of "the longeſt liver of them two, in favour of Jean Maconochie, the "grandchild of James Beveridge, in fee."

After the death of James Beveridge, who never was infeft, Jean Maconochie, his grandchild, did not expede a ſervice as heir of proviſion to him, but obtained an infeftment from the bailies, as diſponee, by executing in her own favour the procuratory which had been aſſigned by Robert Cuming.

The creditors of Robert Cuming, the diſponer, who had attached this ſubject by adjudication, followed with infeftment, objected, that Mrs Maconochie's infeftment, from the want of a ſervice to her grandfather, was altogether inept and ineffectual. And in ſupport of this objection.

Pleaded:

Pleaded: Feudal rights of every denomination require in their tranſmiſſion a document in writing. In thoſe which were veſted in a perſon deceaſed, it being neceſſary at the ſame time to aſcertain the death of the predeceſſor, and the devolution of the right to the heir, a ſervice is indiſpenſably requiſite, as the proper and only legal voucher of transference; Stair, b. 3. tit. 5. § 25.; Erſkine, b. 3. tit. 8. § 63.

It is true, that in rights already conſtituted by infeftment in the perſon of the anceſtor, the ſuperior in land, and the bailie in burgage tenements, from their ſuppoſed knowledge of their vaſſal or fellow burgeſs, have been permitted, by precept of *Clare Conſtat*, or by cognition by haſp and ſtaple, to make up for the want of a ſervice, and to give infeftment directly to the heir. But this power, which is the creature of uſage alone, and a deviation from the general rules of feudal conveyance, has never been extended to perſonal rights. An inveſtiture in theſe muſt be altogether incomplete without a ſervice, which connects the warrant for infeftment in favour of the predeceſſor with the infeftment in favour of the heir. Indeed, an extenſion of the powers of the bailies would not aid Mrs Maconochie, by whom, from a miſconception of the nature of her rights, titles have been made up, not in the character of heir of proviſion, but as a diſponee or ſingular ſucceſſor.

Anſwered: The form of a general ſervice, for the purpoſe of eſtabliſhing perſonal or incomplete real rights in the heir, is only neceſſary in the caſe of land-eſtates, In burgage-tenements, where the charter and ſeiſin are contained in one writing, it is ſeldom or never uſed; the bailies, upon their knowledge of the fact, giving infeftment at once to the heir. In this caſe, Mrs Maconochie's title, upon the deceaſe of her grandfather was equally clear as it would have been if his right had been clothed with infeftment.

The Court, in general, were of opinion, that the power of the bailies to give infeftment to heirs without a regular ſervice, was confined to rights in which the anceſtor had died infeft. It was however unneceſſary to decide on that ground; becauſe the infeftment to Mrs Maconochie had proceeded on an erroneous idea, that ſhe was fiar by the terms of the diſpoſition from Robert Cuming.

The Lords "ſuſtained the objection to Jean Maconochie's right, "and found, That the Creditors of Robert Cuming have a pre-"ferable right to the ſubject, by their adjudication and infeft-"ment."

Lord Ordinary, *Alva.* For the Creditors of Cuming, *Mat. Roſs.*
For Mrs Maconochie, *Ilay Campbell,* Clerk, *Orme.*

C.

N° CXXXV.

N° CXXXV. *December* 9. 1783.

HELEN and ELISABETH BURNETTS,

AGAINST

Sir WILLIAM FORBES, Baronet.

LEGACY. IMPLIED CONDITION.—*Condition uncertain.*

A Legacy granted by the father of Sir William Forbes, was conceived in the following terms: "To Arthur Burnett, ſon to "Lord Monboddo, I leave L. 500 Sterling, *to be paid* when he is ſixteen years of age."

Mr Burnett the legatee ſurvived the teſtator, but died when only eleven years old. The queſtion therefore occurred, whether the legacy was due to his ſiſters, as his neareſt in kin, though not exigible by them till the period at which he would have attained his ſixteenth year; or whether, as altogether conditional, it had become ineffectual by his predeceaſe? In an action at their inſtance, they

Pleaded: A reference to a certain period in the age of a legatee has been deemed equivalent to a condition, where it is annexed to the *conſtitution* of the legacy. Thus, in the event which has happened, the bequeſt would have become void, if it had been deviſed in this manner: "To Arthur Burnett, when he attains the age of ſixteen, "I leave L. 500 Sterling." But a different rule prevails, where the legacy itſelf is expreſſed in words abſolute and unconditional, and the reference to the age of the legatee adjected to the term of payment only; as in the caſe of a teſtator, who bequeaths a ſum *payable* or *to be paid*, when the legatee attains a certain age. In ſuch inſtances it has been held, that the legacy veſts *a morte teſtatoris*, though the term of payment, for ſome reaſon known to the teſtator himſelf, is poſtponed to a more remote period.

This diſtinction, which has been received into the Engliſh law from that of the Romans, and is likewiſe acknowledged by ſome of the writers on the law of Scotland, ariſes from the different modes of expreſſion adopted by teſtators, *l.* 5. *C. Quando dies leg. l.* 26. § 1. *D. ad eund. tit.*; *Voet. l.* 36. *tit.* 2. *p.* 2. *et ſeqq.*; *Mantica, De conject. ultim. volunt. l.* 11. *tit.* 23. *p.* 27. *et ſeqq.*; Blackſtone, book 2. chap. 32. tit. 6.; Borough's Reports, vol. 1. p. 226.; Bankt. Book 3. tit. 8. § 42. A legacy may with reaſon be thought conditional, where, as in the inſtance firſt given, its very exiſtence is interwoven with a circumſtance uncertain and contingent in its nature. But the ſame circumſtance occurring only with regard to the term of payment, cannot detract from the validity of a legacy already completely eſtabliſhed.

eſtabliſhed. In legacies of this laſt ſort, therefore, upon the deceaſe of the legatee, his repreſentatives may inſiſt for payment in like manner as he himſelf could have done. Hence the deciſion of this caſe muſt be the ſame, as if, in place of a reference to the legatee's attaining a certain age, the teſtator had appointed the payment to be made on 20th April 1779, being the day on which the young gentleman, if alive, would have reached his ſixteenth year. Nor is it of importance, that, in bonds of proviſion, a different interpretation has been given to clauſes of this nature, becauſe in ſuch deeds, after the death of the child to whom they were granted, the inductive cauſe of the obligation is entirely removed.

Anſwered for the defender. It is an eſtabliſhed rule with reſpect to legacies, That *dies incertus an extiturus ſit necne, pro conditione habetur.* Nor is it productive of any real difference, whether ſuch an uncertain day be annexed to the *conſtitution* or to the term of *payment* of a legacy. A bequeſt to a perſon when he arrives at a certain age, cannot be due when he has not attained, and never can attain that age; and a bequeſt which is not payable till that event has taken place, muſt be in the ſame ſituation.

For the purpoſe, indeed, of reconciling ſome apparently oppoſite deciſions of the Roman lawyers, preſerved in the Pandects, and which are merely exceptions, on account of particular circumſtances, from the general rule, the commentators on the Civil law have determined, that where the legacy itſelf and the term of payment are ſpecified in different members of the ſame ſentence, a reference to the age of the legatee annexed to the latter, may be conſidered as not ſuſpenſive of the right, but merely of the term of payment. This diſtinction, however, having no foundation but in a grammatical ſubtilty, has been rejected by repeated deciſions of this Court, with regard to bonds of proviſion, in which the child's right, ariſing from the natural obligations of parents, ought to be deemed ſtronger than that of a legatee, whoſe claim flows from the bounty alone of the teſtator. Dictionary, *voc.* Implied condition; Stair, 17th January, Gilmour, July 1665, Edgar; 22d February 1677, Belſches; Harcus, July 1687, Moir; Rem. Dec. 1ſt February 1749, Executors of Bell *contra* Maſon. Nor even in the law of England is the diſtinction adopted, except by the eccleſiaſtical courts, the adherence of which to the doctrines of civilians is peculiarly ſtrict; Blackſtone, *loc. ſup. cit.*

The Lords, moved chiefly by the authority of the Roman law, in which the diſtinction urged by the purſuers ſeemed clearly eſtabliſhed, found, That the legacy in queſtion having veſted in Mr Burnet *a morte teſtatoris*, was due on his deceaſe to the purſuers as his neareſt in kin.

Lord Ordinary, *Swinton.* Act. *Maclaurin, Blair.* Alt. *Ilay Campbell, C. Hay.*
Clerk, *Menzies.*

C.

N° CXXXVI. *December* 9. 1783.

The SHERIFF-CLERKS, Petitioners.

JURISDICTION. *Powers of the Court of Seſſion in regulating the dues of officers in inferior judicatories.*

THE fees of the officers in the Sheriff-courts were regulated by the laws of Malcolm, c. 7.; and by an act of the privy council, with the concurrence of the Court of Seſſion, in 1606, confirmed by a ſtatute in 1621; when a power was granted to the Privy Council to aſcertain ſuch fees as had been omitted, and their determination declared equivalent to an act of Parliament.

Upon the abolition of the heritable juriſdictions, authority was given, by act 20th Geo. II. cap. 43. to the Court of Seſſion, on or before the 25th of March 1748, to fix, by one or more acts of ſederunt, the dues exigible by thoſe employed in the circuit, Sheriff, and Stewart courts, which ſhould not be altered but by act of Parliament; which acts of ſederunt were accordingly made.

Theſe regulations the Sheriff-clerks thought incomplete and inadequate. They complained, that while ſome articles of employment were omitted altogether, or rated below their proper value, expedients had been fallen upon to evade even the eſtabliſhed fees. Thus, it was ſaid, that the fees payable at the inrolment of freeholders had never been mentioned; that the rate of the dues of extract, which had been proportioned to paper of an ordinary ſize, was become much too low, by the increaſed dimenſions of that now in uſe, calculated to diminiſh the expence of the ſtamp-duties leviable by Government; and that the hypothec for their dues competent to them on the papers lodged in Court, had been eluded, by the parties obtaining advocations to the Court of Seſſion, the whole vouchers being in this manner taken out of their hands.

All theſe different grounds of complaint were enumerated in a petition for the Sheriff-clerks, in which they craved the authority of the Court of Seſſion for exacting their dues in future according to tables propoſed by them.

Upon adviſing this petition, the Lords ordered a hearing on the competency of the Court of Seſſion to make ordinances of this ſort; when it was

Pleaded for the Sheriff-clerks: It were equally abſurd, that dues of this kind ſhould be capable of aſcertainment by the legiſlative authority only, as that they ſhould be left, in every inſtance, to the covenant of parties. The cogniſance of ſuch matters, therefore, muſt be lodged in the ſupreme judicatories, who are authoriſed to find a remedy

remedy for every wrong, and in a peculiar manner to direct the meaſures neceſſary for the ſpeedy and regular adminiſtration of juſtice.

Formerly the Privy Council of Scotland conſidered themſelves as warranted along with the Court of Seſſion, to adjuſt the fees which might be demanded in the different courts; and although, after they had committed many acts of uſurpation and arbitrary power, their abolition took place in the year 1710, their civil authority, where not inconſiſtent with the principles of political liberty eſtabliſhed at the Revolution, has been underſtood to be transferred to the Court of Seſſion, as that in criminal matters has devolved on the Juſticiary Court; Kames's Introduction to the Principles of Equity, p. 14. edition 1765; Bankton, b. 4. tit. 9. § 22. The Court of Seſſion accordingly, in ſeveral inſtances, have exerciſed a juriſdiction of this ſort. In 1723, when the mode of ſtriking the Sheriff-fiars was eſtabliſhed, they ordained extracts to be given at the rate of 7 d. each: And in the year 1765, upon a complaint that the Sheriff-clerks were defrauded of their dues of extract, in conſequence of the parties obtaining letters of advocation, they appointed a committee of their number to give redreſs.

Nor can the inſtances in which the regulations enacted by the Privy Council, and by the Court of Seſſion, have received a parliamentary ſanction, or have been preceded by ſpecial commiſſion from the legiſlature, be viewed as derogatory to the inherent and original juriſdiction of thoſe Courts. The ſtatutes of that import were obviouſly intended to give the effect and permanency of an act of parliament to the particular regulations then introduced; as may be ſtrongly inferred from the expreſſions uſed by the Court of Seſſion in 1748, which limit, in very clear terms, the acts of ſederunt of that date, "to the "dues exigible for or on account of the reſpective matters or things "aſcertained in the ſaid tables."

Obſerved on the Bench: A diſtinction ought to be made between the eſtabliſhment of a general code of regulations, and an interpoſition in particular inſtances, either where no regulation has taken place, or where thoſe in force have been evaded. Of the latter ſort were the act of ſederunt in the year 1723—the one propoſed in the year 1765; and ſuch would be any explanation which might be neceſſary with regard to the increaſed ſize of paper uſed in deeds ſubject to the ſtamp-duties.

The former was the prerogative of parliament. The Privy Council of Scotland, an arbitrary and tyrannical court, aſſumed it in the year 1606; but the rules they introduced were ſoon after ratified in parliament. The various parliamentary commiſſions ſince that time, and the ſtatutory regulations in 1672, 1695, and 1696, concerning the dues exigible in the Courts of Seſſion and Juſticiary, were ſo many proofs that no authority of that extent could be exerciſed by any court in Scotland.

This application was conſidered by the Court as an attempt to obtain

tain an alteration of the acts of ſederunt 1748, which by 20th Geo. II. had been declared unalterable, except in Parliament.

The Lords " found, That the Court had no power to vary, alter, " or make any addition to the fees eſtabliſhed by the acts of ſede- " runt 1748, and therefore refuſed the petition."

For the Sheriff Clerks, *Croſbie, Blair.* Clerk *Home.*

C.

N° CXXXVII. *January* 16. 1784.

JOHN PATERSON,

AGAINST

JAMES THOMSON.

EXECUTION—*of inhibition ſuſtained, though not mentioning* in gremio, " *witneſſes to the premiſes.*"

PATERSON purſued Thomſon in an action of reduction *ex capite inhibitionis.* Thomſon objected, that the inhiblion was null, its execution concluding thus: " Which copy of inhibition was ſigned " by me, and did bear the date hereof, &c. with the names and de- " ſignations of Andrew Johnſton ſutor in Selkirk, and William Stew- " art weaver there;" without mentioning that they " were witneſſes " to the haill premiſes," according to the uſual ſtyle; although they actually did ſubſcribe, and annex to their ſubſcriptions the word " witneſs." In ſupport of this objection the defender

Pleaded: The law requires that *diligence* ſhould be regularly and formally executed, and has appointed the meſſenger's report or *execution* as the only evidence of ſuch formality. If in any caſe it does not thence fully appear, the diligence muſt fall to the ground. From this principle proceeded the act of ſederunt 28th June 1704, prohibiting *blank executions*; together with a variety of deciſions quoted in the Dictionary, *voce* Execution, and likewiſe one not collected, Herriot *contra* Magiſtrates of Haddington, 23d December 1740. It is true, that the word " witneſs" is here ſubjoined to the names of the perſons ſubſcribing; but that addition denotes nothing more than an atteſtation of the meſſenger's ſignature, and not of the facts narrated in his *execution.*

Anſwered, Though the preciſe words " witneſſes to the premiſes,' are not engroſſed in the body of the *execution,* yet in the whole of that writing taken together their meaning is ſufficiently expreſſed; than which the

the law requires nothing farther; agreeably to the determination of the Court in the caſe of Clark *contra* Waddell, 17th July 1752, Fac. Coll.

The Lord Ordinary "repelled the objection." And, on adviſing a reclaiming petition and anſwers,

The Lords adhered to the interlocutor of the Lord Ordinary.

The defender again reclaimed; when his petition was appointed to be anſwered. But the Court ſtill adhered to their former judgment.

Lord Ordinary, *Braxfield.* Act. *Ad. Ogilvie.* Alt. *Macleod.*
Clerk, *Robertſon.*

S.

N° CXXXVIII. *January* 24. 1784.

Poor JOHN RUNCIMAN,

AGAINST

HERITORS and KIRK-SESSION of the Pariſh of Mordington.

POOR.—*Reſidence for three years preceding poverty, though eight years prior to the application for charity, makes a pariſh liable for the maintenance of a pauper, notwithſtanding that his poverty did not commence till a year after his leaving the pariſh.*

RUNCIMAN, a day-labourer, had reſided in the pariſh of Mordington for ſeventeen years preceding 1769; when he removed his habitation to a neighbouring pariſh. In 1770, he was ſtruck with blindneſs, and ſo deprived of the means of ſubſiſtence. In 1777, he made application for aliment to the firſt mentioned pariſh, which the Sheriff of the county enforced by a decreet; and though the pariſh obtained a ſuſpenſion of this decree, they continued to allow the pauper about a half of the ſums decerned for. But being again charged upon the Sheriff's decreet, they withheld their charity entirely, and by another ſuſpenſion brought the cauſe into Court; when they

Pleaded: It is reſidence for three years immediately previous to the application for charity, which alone entitles a pauper to claim it from a pariſh; a rule quite eſtabliſhed by deciſions of the Court; as, Pariſh of Dunſe *contra* Pariſh of Ednam, 5th June 1745, with ſeveral others of a later date: Whereas this pauper had not reſided within the pariſh in queſtion for ſeven or eight years preceding his demand.

Anſwered: From the deſign of the law, it is plain, that the period to be conſidered is that when the ordinary means of ſubſiſtence fail, which for the moſt part will likewiſe be the time of the application for public charity; ſo that the latter expreſſion ought to be conſtrued as ſynonymous with the former. Now when the charger's poverty commenced, he had not been above one year abſent from the pariſh of Mordington; which therefore was the only pariſh bound to relieve his neceſſities.

The Lord Ordinary pronounced this interlocutor: "In reſpect it "does not appear that the charger's reſidence was within the pariſh "of Mordington for *three years immediately preceding the charge*, ſuſ-"pends the letters *ſimpliciter*, and decerns."

But the Court having altered that judgment, found, "That in re-"ſpect the charger reſided in the pariſh of Mordington until a year "prior to his blindneſs, and afterwards acquired no funds for ſub-"ſiſtence, that pariſh was liable for his aliment; and found the let-"ters orderly proceeded."

Lord Ordinary, *Monboddo*. Act. *Dickſon*. Alt. *Drummond*.
Clerk, *Menzies*.

S.

N° CXXXIX. *February* 3. 1784.

WILLIAM SCOTT,

AGAINST

ANDREW GRAY.

BILL OF EXCHANGE. PRESUMPTION. *A partial payment made, and marked on the back of a bill, after the running of the ſexennial preſcription, by the repreſentative of the debtor, ſaves from the preſcription.*

ANDREW GRAY granted a bill to Scott. After this bill had undergone the ſexennial preſcription of act 12th George III. John Gray, the heir of Andrew, who had died in the interim, made a partial payment of its contents, expreſſing his having done ſo by a marking on the back of it in his own hand-writing. Scott having ſued John in an action for the balance, it was

Pleaded for the defender: Had the marking in queſtion been affixed after the lapſe of the ſtatutory period by the debtor himſelf, then perhaps it might have operated as a written acknowledgment of ſubſiſting debt; but ought not to have that effect, when done by his repreſentative,

preſentative, miſled, through ignorance, by the appearance of an unretired bill.

Anſwered: The ignorance alleged by the defender is contrary to the preſumption ariſing from the circumſtances of the caſe above mentioned, and no proof of it has been given.

The cauſe was reported to the Court by the Lord Ordinary.

The Lords "found the partial payment of the debt in queſtion "ſubſequent to the running of the ſexennial preſcription, and other "circumſtances of this caſe, ſufficient to bar the ſaid preſcription."

The Court adhered to this judgment, after adviſing a reclaiming petition and anſwers.

Lord Ordinary, *Stonefield.* Act. *Wight, Currie.* Alt. *Henry Erſkine.*
Clerk, *Campbell.*

S.

N° CXL. *February* 3. 1784.

WILLIAM PALMER,

AGAINST

CHARLES HUTTON.

PRIZE.

PACTUM ILLICITUM. *A Britiſh ſubject priſoner on board of a French privateer while ſhe captured a Britiſh ſhip, having purchaſed the prize* bona fide *on his own account, was found to have not thus acquired the property.*

RECOMPENCE. *Upon the ſhip's being reclaimed by the original owner, the only recompence found due to the purchaſer was the legal ſalvage premium, or one eighth of the value, though the price was nearly adequate to its full amount. This tranſaction comes not under ſtat.* 22. *G. III.*

A French privateer having captured a ſhip, of which Hutton was maſter, he, together with his crew, were kept priſoners aboard the privateer, and his veſſel was ſent into port. Meanwhile the privateer made prize of another ſhip, which had been abandoned by thoſe on board of her, and which belonged to Palmer. It ſeems, that now the French Captain, unwilling to ſpare hands for the manning of this ſecond prize, which was but of ſmall value, at firſt determined to ſink the veſſel; but afterwards it was agreed between him and Hutton, that the latter ſhould purchaſe her at the rate of 150 guineas. One of Hutton's crew was retained as a hoſtage in

in ſecurity of the price, while with the reſt he himſelf returned home in the ſhip; bringing along with him, in the hand-writing of the French Captain, a ſort of certificate of the bargain, ſpecifying the particulars above mentioned. Having in this whole tranſaction conſidered himſelf to have made a lawful purchaſe for his own behoof alone, Hutton, without acknowledging any intereſt in Palmer, employed the ſhip as his abſolute property. Palmer on the other hand, as ſoon as he got notice of the affair, reclaimed her, by an action in the High Court of Admiralty, which afterwards came by ſuſpenſion before the Court of Seſſion.

Pleaded for the purſuer: The defender is bound to deliver up, without any recompence or gratuity, a ſhip of which the purſuer is the only lawful owner. The defender could not acquire a right to the veſſel by any contract with the captors. All ſtates deem war unjuſt on the part of their antagoniſts; for every ſtate aſſerts the juſtice of its own cauſe. Hence a capture by the enemy is always a wrongful act, from which no right can ſpring, and by which no property can be transferred. Vid. *Bynkerſhoek, lib.* 1. *cap.* 3. *de ſtatu belli inter hoſtes.* Thus, in reſpect of our country and its laws, the capture in queſtion was injuſtice and rapine, and the captors mere violators of the purſuer's property, who being themſelves deſtitute of right, could impart none to the defender. This concluſion is not leſs juſtified by expedience; for otherwiſe the chance of recapture, which naturally continues during the warfare, (Stat. 4. and 5. of William and Mary, cap. 25.), would be loſt, and ſcope given to many treaſonable frauds. It is true, that in the eye of the power which makes the capture, the ſame act which on the other ſide was viewed as unjuſt in the extreme, appears a reſult of the principle of retaliation, ſo perfectly equitable and right, that no *modus acquirendi dominii* can be more lawful; and that hence neutral ſtates are permitted to be more impartial, to recogniſe the rights of war on either ſide, and acquire property taken in it. Still, however, to give a juſt title to the purchaſer, a previous condemnation in the courts of law of the country of the captors is neceſſary; ſo that were the defender even the ſubject of a neutral power, he could not plead this as a valid ſale. See Benton *contra* Brink, 23d July 1761; Burrow's Reports, Goſs *contra* Withers, 23d November 1758.

As, therefore, the defender can claim no right of property in the purſuer's ſhip, ſo neither is he entitled to any recompence from him, much leſs to repayment of the price ſtipulated by the French Captain, which is almoſt equal to the value of the veſſel. An illegal bargain, as that between the latter and the defender was, can never be the foundation of any claim in a court of law. It is an evil indeed which may be conſidered as falling under the ſanction of the late ſtatute, prohibiting the ranſoming of Britiſh ſhips. Nay, though the tranſaction had been leſs unlawful, the defender, who even pretends not to have acted on the purſuer's behalf, but for his own intereſt alone, ſeems hardly entitled to the character or rights of a *negotiorum geſtor.*

Anſwered:

Anſwered: It has been admitted, that by capture in war, property is ſo far transferred, that the ſubjects of neutral ſtates may lawfully acquire it by purchaſe from the captor; and this conceſſion ought not to have been limited, by ſuppoſing the neceſſity of any antecedent condemnation, of which the ſole efficacy is to aſcertain the *bona fides* of the purchaſer, and ſtrengthen his title againſt future challenge. The right of the captor reſults immediately from the ſeizure of his prize, independently of every other circumſtance, ſuch as *deductio intra præſidia, Voet, ad tit. Digeſt. de captiv.* § 3. Now, why may not a Britiſh ſubject place himſelf in competition with ſtrangers at the ſale of Britiſh property taken in war; or purchaſe without ſuch competition, and do ſo at ſea, as well as on ſhore? If no good reaſon can be aſſigned for theſe reſtraints, then is the defender the true proprietor of the ſhip in queſtion. The ſtatute alluded to relates only to the ranſoming of veſſels by thoſe in whoſe poſſeſſion they are taken; and as to the argument concerning fraud, it is evident that there is not any room for that ſuſpicion in this caſe.

If, nevertheleſs, the purſuer ſhall be ſuppoſed entitled to reclaim the property, the defender muſt have an equal right to a recompence, for effecting its reſtoration. This equitable claim is not to be forfeited by the inefficacy of the ſale, which, on that ſuppoſition, influences only his right of property. No fraud in his conduct, nor any criminal act has intervened to bar his retribution; and it is of no conſequence, that he acted on the idea of acquiring a right to himſelf alone; as the effect produced, not its motive, is the ground of that claim. Neither is he requiring in a court of law, the fulfilment of an illegal contract; he demands a juſt recompence only, for a pecuniary benefit *optima fide* conferred by him. That recompence, if it exceed not the value of ſuch benefit, ought at leaſt to be ſufficient to ſave him from loſs; for it is a great maxim of equity, that *nemo locupletior fieri debet alterius damno.* To this degree the defender conſents to moderate his demand; requiring nothing more of the purſuer, than relief from his engagement to the captor, by redelivery of the hoſtage.

This cauſe was reported to the Court by the Lord Ordinary; when, conſidering the ſtatute againſt ranſoming as entirely out of the queſtion,

"The Lords found, that the property of the ſhip in diſpute was "not transferred to the defender by the ſale made to him, and "that the purſuer is ſtill entitled to reclaim or recover the ſaid ſhip; "but found, that the defender is entitled to a recompence for his "bringing the ſhip within the purſuer's power to reclaim it; and re"mitted to the Lord Ordinary to call and hear parties procurators on "the extent of that recompence."

Both parties reclaimed againſt this interlocutor; the purſuer, ſo far as a recompence was to be allowed to the defender, and the latter, in as much as the property was adjudged to the former.

On adviſing mutual petitions and anſwers, the Court adhered, modifying the recompence to the amount of " the legal ſalvage premium " aſcertained by the ſtatute to recaptors, together with the expence " laid out on the veſſel.'

Lord Reporter, *Eſkgrove.* Act. *Macleod.* Alt. *Alex. Abercromby.*
Clerk, *Robertſon.*

S.

N° CXLI. *February* 4. 1784.

The APPARENT HEIR of JOHN PORTEOUS of Glenkirk,

AGAINST

Sir JAMES NASMITH.

ADJUDICATION—*for debts not properly liquidated. Effect of accumulating different debts in one decreet of adjudication, where one of the debts is not due, or not regularly conſtituted.*

JOHN PORTEOUS of Glenkirk, poſſeſſed lands belonging to the Earl of Selkirk for ſeven years, under a tack, and he continued in poſſeſſion two years longer by tacit relocation.

The Earl, being at the ſame time creditor, by bond, to John Porteous, deduced an adjudication of his lands, in which the nine years tack-duties, and the ſum contained in the bond, were accumulated together in the ſame decerniture.

Sir James Naſmith acquired right to this adjudication; againſt whom it was objected, that no decreet of conſtitution had been obtained, in order to aſcertain the tack-duties due to the adjudger. Erſkine, book 2. tit. 12. § 4.

The Lords were clearly of opinion, that to the extent of the rents due by the contract of leaſe, the debt was liquidated with ſufficient preciſion by the leaſe itſelf; and that it was competent to the landlord to adjudge for ſuch, without the formality of a decreet of conſtitution, in the ſame manner as it was to a creditor by bond to adjudge for bygone annualrents.

With regard to the tack-duties of thoſe years, however, during which the debtor had poſſeſſed by tacit relocation, their opinion was different, becauſe the adjudication was in this reſpect altogether unwarranted by any voucher, and therefore equally exceptionable as if no debt had been due. The effect of this informality, it was farther obſerved, was a total nullity in the adjudication, and not merely a reſtriction as to the tack-duties of the two years, which laſt would have taken place, if the different ſums, inſtead of being accumulated, had been ſeparately decerned for.

The

The Lords pronounced the following interlocutor, to which they adhered upon adviſing a reclaiming petition and anſwers :

" In reſpect the decreet of adjudication was led for bygone rents, " without any previous decreet of conſtitution, and that the whole " debts adjudged for are accumulated into one ſum without di- " ſtinction ; find that the ſame is to be ſet aſide *in totum*.

Lord Ordinary, *Weſthall.* For the apparent heir, *Rolland, D. Williamſon.*
Alt. *Hay, Honyman, Mark Pringle.* Clerk, *Home.*

C.

N° CXLII. *February* 4. 1784.

The APPARENT HEIR of JOHN PORTEOUS,

AGAINST

Sir JAMES NASMITH.

ADJUDICATION.—Pluris petitio, *when the whole of the ſums adjudged for were due, but not to the adjudger.*

SIR JAMES NASMITH acquired right to three fourths of a bond granted by John Porteous ; and as he was in treaty with the creditor on the remaining fourth, which he afterwards acquired, he deduced an adjudication for the whole debt.

By one interlocutor, the Lords found the adjudication null *in totum*. But upon adviſing a reclaiming petition, with anſwers, a diſtinction was adopted between a *pluris petitio*, when the ſums adjudged for were not owing, or, which was the ſame thing, not vouched in a legal manner, and when the debt was truly due, but not to the perſon who had obtained the adjudication.

The Lords found, " that the adjudication led at the inſtance of Sir " James Naſmith, was to ſubſiſt as a ſecurity for the three fourths of " the debt, and penalties effeiring, which were in Sir James Naſ- " mith's perſon when the diligence was led."

Lord Ordinary, *Weſthall.* *Partibus ut ſupra.*

C.

N° CXLIII.

N° CXLIII. *February* 4. 1784.

JANET HOUSTON, and others,

AGAINST

JOHN HOUSTON.

SERVICE OF HEIRS. *In the entry of heirs* more burgi, *the want of the legal formalities is not to be ſupplied by equipolent circumſtances.*

GEORGE HOUSTON executed a diſpoſition of certain heritable ſubjects lying within the burgh of Fortroſe, "in favour of himſelf "in liferent, and of the heirs of his body in fee; whom failing, in "favour of his brother John Houſton, and the heirs of his body."

After the death of George, John took infeftment on the diſpoſition *more burgi*. In the inſtrument of ſeiſin, however, it was not expreſſed, that the bailies had cognoſced his title as heir of proviſion; nor that, in virtue of the procuratory, the ſubjects had been reſigned into their hands. John having afterwards diſponed them to a natural ſon of his, Janet Houſton and other heirs at law of George, inſiſted in a reduction of John's infeftment, as being, from the defects above mentioned, null and void.

Pleaded for the purſuers: Cognition by the bailies, of an heir's title, is an indiſpenſable requiſite to his entry by haſp and ſtaple, or *more burgi*; and it is likewiſe neceſſary that reſignation of the heritage ſhould be made into their hands. The only legal evidence of theſe eſſential circumſtances is the inſtrument of ſeiſin; but from that in queſtion they do not appear to have taken place; *vid.* Stair, b. 2. tit. 3.; Bankton, b. 3. tit. 5.

Anſwered: It ſeems needleſs to have mentioned in the ſeiſin, that cognition had been taken of a fact which muſt have been notorious to the bailies; and with reſpect to the reſignation, the diſponee, who in the inſtrument is deſcribed as holding the diſpoſition in his hand, ought to be viewed in the double character of procurator for the diſponer, and of receiver of infeftment.

The Court conſidered the plea of the defender as tending to annihilate the eſtabliſhed feudal forms; and on that ground, (the queſtion relative to the competency of the ſervice not having been agitated),

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The Lord Ordinary having "ſuſtained the reaſons of reduction, "and objections to the ſeiſin,"

The Lords adhered to that interlocutor.

Lord Ordinary, *Hailes.* Act. *Elphinſton.* Alt. *James Grant.* Clerk, *Home.*

S.

N° CXLIV. *February* 10. 1784.

DANIEL FRASER,

AGAINST

JAMES GIBB.

NEAREST IN KIN. EXECUTOR. SERVICE AND CONFIRMATION. *Debtors are not bound to make payment to executors or neareſt of kin, unleſs confirmation has been obtained as to their full debts.*

FRASER, as next of kin, and executor, of a creditor of Gibb, and as having expede confirmation with reſpect to ſome other of the defunct's effects, and in a portion likewiſe of Gibb's debt itſelf, ſued him for payment, and obtained decreet againſt him. Gibb preſented a bill of ſuſpenſion; but it having been refuſed by the Lord Ordinary on the bills, he, in a reclaiming petition,

Pleaded: To give an active title to a creditor's executor, confirmation reſpecting the particular debt claimed has ever been found to be neceſſary; although, by being partially confirmed, the executor may render the office itſelf tranſmiſſible to legal or to conventional ſucceſſors; as was determined in the caſe of the Executors of Murray, 4th December 1744, Rem. Deciſ.

Anſwered: "The confirmation by an executor, *qua* next of kin, of "any one ſubject belonging to the deceaſed, as it proves his right of "blood, and conſequently his title to the legal ſucceſſion of his move-"able eſtate; ſo, by our lateſt deciſions, it has been adjudged to carry "the whole executry out of the teſtament of the deceaſed, and to "make even the part which was not confirmed, to tranſmit to the "executors of the perſon confirming on his death." Erſkine, b. 3. tit. 9. § 30.

Obſerved on the Bench: The effect of partial confirmation, preciſely like that of a general diſpoſition of moveables, is to give *jus ad rem*; but in order to confer *jus in re* as to any particular ſubject, the executor muſt be confirmed in ſuch ſubject itſelf.

The Lords therefore remitted the cauſe to the Lord Ordinary, with an inſtruction to paſs the bill.

Lord Ordinary, *Swinton.* Act. *G. Ferguſſon.* Alt. *M. Roſs.* Clerk, *Home.*

N. B. The Lord Ordinary having, on the above ground, *ſuſpended the letters*, found expences due by the charger, with reſpect to which he reclaimed to the Court;—but his petition was refuſed, without anſwers.

S.

N° CXLV. *February* 10. 1784.

ADAM HUNTER,

AGAINST

ALEXANDER HUNTER.

BASTARD. *Letters of legitimation do not entitle agnates to ſucceed to a baſtard, without a ſpecial proviſion in their favour.*

ROBERT HUNTER diſponed the lands of Polmood to his natural ſon George, for whom he had obtained letters of legitimation. The deſcendants of George terminated in his grandſon Thomas Hunter, who conveyed theſe lands to Mr Alexander Hunter.

This conveyance Adam Hunter, the deſcendant of a brother of Robert *Hunter*, brought under challenge, as executed on deathbed, and on other grounds; when it was objected by the defender, That there was no room for agnates in the ſucceſſion of perſons legitimated by the Sovereign, without a ſpecial clauſe to that effect; and of conſequence that the purſuer had in this inſtance no title to inſiſt in the action, agreeably to the deciſion in the caſe of Ramſay *contra* Goldie, 4th January 1758, which was affirmed on appeal.

The Lords found, "That the purſuer had no ſufficient title to carry on the preſent proceſs, and aſſoilzied."

Lord Ordinary, *Elliock.* Act. *Croſbie, Honyman.* Alt. Lord Advocate *Campbell.* Clerk, *Menzies.*

C.

N° CXLVI.

N° CXLVI. *February* 12. 1784.

HUGH LAWSON, and others,

AGAINST

ALEXANDER MAXWELL.

PRIVILEGED DEBT—*Medicines furniſhed during a laſt ſickneſs of long duration, not ſuch.*

FOREIGN. *The privilege does not extend to the caſe of Scotſmen receiving ſuch aſſiſtance, while out of the kingdom.*

A Perſon affected with a violent paralytic diſorder, having been carried from his houſe in Scotland to London, was put under the care of Mr Maxwell, a ſurgeon in that city; who continued his attendance upon him during ten months, while he remained there. He never convaleſced, his diſeaſe having thrown him into a ſtate of inſanity; though he did not die for ſix months after his return to Scotland, where he received the aſſiſtance of another ſurgeon.

In a competition of his creditors, Mr Maxwell claimed a preference for his account of medicines and attendance during thoſe ten months, as being a privileged debt. The other creditors objected to this demand, and

Pleaded: The privilege claimed is due to medicines furniſhed to perſons on *death-bed* only. The legal interpretation of that term limits it to *ſixty* days preceding death. It is during that period alone that phyſicians fees are to be preſumed not paid; 7th February 1717, Dr Ruſſel *contra* Sir James Dunbar, Dict. of Deciſ. *voce* Preſumption; 7th February 1755, Dr Park *contra* Langlands, Fac. Coll.; and in practice ſurgeons do not require their privilege to be extended farther. If indeed it were not ſo defined, the funds of perſons conſumptive, paralytic, or inſane, and others afflicted with diſeaſes of the duration of years, would often be wholly exhauſted by the demands of their ſurgeons.

Anſwered: That perſons afflicted with diſeaſe may not want any poſſible means of relief, is, in all civilized ſociety, a natural object of the law. Hence, to encourage thoſe by whom medicines are adminiſtered, to give their aid to the ſick, it aſſures them of a recompenſe out of the moveable effects of their patients, even though they ſhould not live to be in a capacity of beſtowing the reward. Happily the continuance of ſuch incapacity is ſeldom ſo long as ſixty days. Nor is it the claimant who pleads that mankind ſhould, in behalf of his profeſſion, be preſumed, *præſumptione juris et de jure*, to have been in that ſtate during the whole laſt two months of their lives, though

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a doctrine which, if admitted, might prove highly beneficial to the medical practitioners. This curious argument comes from the other ſide; and the temptation which led to it ſeems to have been a notion that the *præſumptio juris et de jure* of incapacity or deathbed-ſickneſs during that period, implied a like preſumption of ſufficient capacity or perfect health prior to it. So ſtrange an idea needs not to be refuted; and as this claim is founded even on the admitted incapacity of the patient in queſtion, it ought to be ſuſtained. The practice of ſurgeons in making their demands, correſponds to the principle by which theſe are authoriſed. To limit them to *ſixty* days, would be to indicate blame for permitting their patients to live ſo long. As for diſeaſes of very long continuance, inſanity excepted, it is rare that they ſhould be accompanied with incapacity; but it is certainly juſt that in them, as well as in more acute diſtempers, the ſick ſhould enjoy the benignity of the law.

The Lord Ordinary ſuſtained the above-mentioned claim of preference; and

The Lords adhered to the interlocutor of the Lord Ordinary.

In a reclaiming petition Mr Lawſon farther argued, That the debt having been contracted in England, it ought to be judged of by the law of that country; and as there it was no wiſe privileged, ſo neither was any preference due to it here. To this plea Mr Maxwell anſwered, that it was difficult to conceive why a perſon ſhould have forfeited the protection of the law of this country, merely by going into our neighbouring one, and for the moſt neceſſary of all cauſes too, the recovery of his health; and yet that this conſequence ſeemed to be implied in depriving him, on that account alone, of ſo very important a privilege.

On adviſing that reclaiming petition with the anſwers, in which the foregoing arguments were likewiſe repeated,

The Court, without paying more regard than before to the above argument about *deathbed*, ſeemed to alter their opinion of the point formerly determined. All the Judges now conſidered that, beſides what reſults from the incapacity of the patient, there ſhould be ſome other limitation of the period during which ſurgeons accounts are to be deemed *privileged*. Some of them, however, thought it might be allowed to extend to *many* months; others mentioned *three* or *four* months; and ſome viewed even *ſixty* days as a proper period, though not from its having any relation to the law of deathbed.

The argument founded on the *lex loci contractus* ſeemed to be unanimouſly adopted by the Court.

The Lords therefore altered their former interlocutor, and rejected the claim of preference.

Lord Ordinary, *Ankerville*. Clerk, *Orme*. For Lawſon, *Corbet*. Alt. *Dalzell*.

S.

N° CXLVII.

N° CXLVII. *February* 19. 1784.

ROBERT RICHARDSON,

AGAINST

ARCHIBALD SHIELLS.

SERVICE AND CONFIRMATION. GENERAL ASSIGNATION. *The property eſtabliſhed by the poſſeſſion of a general diſponee unconfirmed, is limited to the ſubjects poſſeſſed.*

BANKRUPT. *Sequeſtration, in virtue of the bankrupt ſtatutes, of the effects of a perſon deceaſed.*

ALEXANDER ORR had become bound to diſpone certain lands, but died before fulfilling that obligation, though after a bond had been granted to him for the price. His eldeſt ſon, who was his univerſal diſponee, poſſeſſed the lands for ſome years. He then obtained a ſequeſtration, in terms of the ſtatute 1772, of the effects belonging to himſelf and to his father.

Afterwards Archibald Shiells, a creditor of the father, *expede* a confirmation, as executor-creditor, and gave up in inventory the bond above mentioned; when a competition enſued between him and Mr Richardſon, the factor under the ſequeſtration.

Pleaded for Mr Richardſon: It is no longer an invariable rule, that the tranſmiſſion of moveable effects from the dead to the living is perfected by confirmation alone. Either a partial confirmation, 23d Jan. 1745, Creditors of Mr Hugh Murray; the poſſeſſion of moveables, Kilkerran, 3d February 1744, Children of Baird *contra* Gray; the renewal of bonds, or other vouchers of debt due to the predeceſſor, 10th February 1751, Spence *contra* the Creditors of Alcorn; the receiving payments or granting diſcharges; or, in a word, any act whereby the ſucceſſors in the moveable eſtate, whether neareſt in kin, or general diſponees, ſignify a reſolution to undertake a repreſentation of the deceaſed, 10th March 1769, Pringle *contra* Veitch, is effectual to eſtabliſh in them the whole executry-funds. By the general diſpoſition, therefore, followed by poſſeſſion of the lands for which the bond was granted, the ſums in queſtion were completely tranſferred to the general diſponee, and fell of conſequence under the ſequeſtration of his effects.

Anſwered for the Executor-creditor: The neareſt in kin, or a general diſponee, may indeed, without confirmation, acquire the property of particular ſubjects, in conſequence of attaining poſſeſſion; and it may

therefore be here admitted, that after payment, or a renewal of the bond in favour of the ſon, the creditors of the father could no longer attach it as *in bonis* of their debtor. This mode of transference, however, is not, like that by confirmation, univerſal in its nature; the act of poſſeſſion being at the ſame time the foundation of the acquiſition and the meaſure of its extent. The fund in diſpute therefore muſt ſtill be viewed as the property of the defunct; for the poſſeſſion of the lands, which could not be attained in virtue of a diſpoſition to the moveable eſtate, is altogether out of the queſtion.

Mr Richardſon likewiſe endeavoured to found an argument on the terms of the ſequeſtration, which related as well to the effects of Alexander Orr, the father, as to thoſe of the ſon. But the Court were clearly of opinion, that a ſequeſtration, in purſuance of the bankrupt ſtatutes, was an inept diligence for attaching the eſtate of a perſon deceaſed. It was likewiſe obſerved, that in order to bring this debt under the ſequeſtration, the factor, as in the right of Alexander Orr *junior*, ſhould have uſed a confirmation *qua* diſponee, or ſhould have obtained a corroborative obligation from the debtor.

The Lords "preferred Archibald Shiells, in virtue of his confirmation."

Lord Ordinary, *Kennet*. For Mr Richardſon, Lord Advocate *Campbell, Wight*.
For Archibald Shiells, *Baillie, Honyman*. Clerk, *Home*.

C.

N° CXLVIII. *February* 20. 1784.

JOHN SPALDING,

AGAINST

MARGARET LAURIE.

TAILZIE,—*not extended, in a queſtion with creditors, to rights afterwards acquired, though of an acceſſorial nature.*

SERVICE OF HEIRS.—*How far the ſervice of one, as heir of tailzie and proviſion, is ſufficient to veſt an eſtate regulated by a ſimple deſtination. The rule, that a ſpecial ſervice includes a general one, how applicable to that of a perſon as heir of entail.*

WALTER LAURIE executed an entail, by charter and infeftment, of his lands of Bargattan, with the uſual reſtrictions, *de non alienando, vel contrahendo debita*. He afterwards purchaſed the teinds,

teinds, which were diſponed "to him and his ſucceſſors in the lands:" But on this diſpoſition no infeftment followed.

After the death of Walter Laurie, his nephew James Laurie *expede* a ſervice as heir of tailzie and proviſion in the lands of Bargattan, and poſſeſſed the eſtate for more than three years.

James Laurie dying without iſſue, his ſiſter, Margaret Laurie, ſerved herſelf heir of tailzie and proviſion to him in the lands of Bargattan. She likewiſe *expede* a ſervice, as heir of tailzie and proviſion to her uncle Walter Laurie in the teinds of theſe lands, under the entail and diſpoſition which have been already mentioned.

John Spalding, a creditor of James Laurie, purſued Margaret Laurie as repreſenting her brother, on this ground, That the teinds having been held by him unfettered by any entail, were liable for his debts.

Pleaded in defence: It is the nature of all acceſſorial rights, to receive the qualifications and reſtrictions incident to the ſubject to which they are annexed; Stair, book 3. tit. 5. § 12, Earl of Selkirk *contra* the Duke of Hamilton, 1740. Thus, the teinds in queſtion, in place of deſcending to the heirs general of the acquirer, muſt go to the heirs of tailzie ſpecified in the inveſtitures of the lands. Upon the ſame principle it muſt be found, that the teinds were entailed. The intention of the defunct, to unite the lands with the teinds, and to tranſmit both to the ſame ſeries of heirs, cannot be more apparent than his reſolution to preſerve that union, and to ſecure the rule of ſucceſſion which he had choſen; nor could any thing be more inconſiſtent, than to give effect to his preſumed intention to perpetuate his whole eſtate in a particular order of ſucceſſion, to the abſolute excluſion of his heirs at law, and at the ſame time to leave a part of it ſubject to the caprice or imprudence of his ſucceſſors.

To this it muſt be added, that teinds, though ſometimes conſidered as a ſeparate eſtate, and capable of being feudaliſed, are in their original nature only a burden affecting lands, ariſing from no feudal conſtitution, but ſuppoſed to be due to churchmen *ex jure divino*, and without any particular grant. Since the year 1633, their connection with the lands is ſo intimate, that an heritor acquiring the teinds of his eſtate is not thought to have made a new acquiſition, but is ſaid to *conſolidate* them with the ſtock. As a proprietor, therefore, of an entailed eſtate, obtaining a liberation from any other ſervitude, would be under no neceſſity, for preventing its revival, to execute a new entail; ſo in this inſtance the purchaſe of the teinds of an eſtate ſtrictly entailed, particularly when deviſed "to the purchaſer "and his ſucceſſors in the lands," muſt be equivalent to their being formally included in the prior ſettlements.

It is only on the ſuppoſition of their being entailed, that the teinds were tranſmitted to the purſuer's debtor. James Laurie's ſervice, as heir of "tailzie and proviſion," did not inveſt him with the double character of heir of tailzie and heir of proviſion; the latter term in the retour being merely exegetical, and ſynonymous with the former. It entitled

entitled him to ſubjects limited by entail, not to thoſe which were not entailed, but regulated by a ſimple deſtination. The teinds, therefore, if not ſubject to the reſtraining clauſes which affect the lands, could only have been veſted by a ſeparate ſervice in the character of heir of proviſion.

Again, the character of heir of line, of heir male, or of conqueſt, in any ſucceſſion, can only belong to one perſon. A ſervice, therefore, in ſpecial, in any of theſe characters, muſt at once eſtabliſh the title of the claimant to all perſonal rights, deſtined by proviſion of law to ſucceſſors of that particular quality; Stair, book 3. tit. 4. § 33. Accordingly it has been found, that ſuch a ſervice, as including in it a general one of the ſame kind, will carry rights not cloathed with infeftment, in the ſame manner as if the heir had completed a general ſervice apart; Erſkine, book 3. tit. 8. § 75. But it is otherwiſe with reſpect to heirs called to the ſucceſſion by the deed of the proprietor. The number of theſe may be as great as there are ſubjects, in which the ſucceſſion *ab inteſtato* is excluded. It does not therefore follow, from the nomination of a perſon to ſucceed in one eſtate, that he is at the ſame time called to the inheritance of a different tenement, deſtined perhaps to the ſame ſeries of heirs, but regulated in its tranſmiſſion by a different deed. Hence the ſervices of heirs of entail and of proviſion, are preciſely limited in their effects to the particular eſtates enumerated in the claim of the party ſerved, and tranſmitted by the writings laid before the inqueſt. According to this rule, the ſpecial ſervice of James Laurie, as heir of tailzie and proviſion in the lands of Bargattan, did not carry the teinds. Theſe remained *in hæreditate jacente* of Walter Laurie, till taken up by the defender as heir to him, and of courſe cannot be liable for the debts of any other perſon.

Anſwered: The governing rule in queſtions of ſucceſſion being the preſumed will of the deceaſed, the tranſmiſſion of acceſſorial or ſubordinate rights has been made to depend on thoſe which are primary, and eminent in their nature, it being altogether improbable that the defunct meant to ſeparate the one from the other. But limitations on property and the freedom of commerce are not to be inferred from preſumptions, however ſtrong. Nay ſince entails derive their ſole efficacy from the ſtatute 1685, which requires the authority of the Court of Seſſion to be interpoſed, and the regiſtration of the infeftments on which the burdens are impoſed in a record kept for that purpoſe, it is plain that they never can extend to ſubjects acquired after their date. Nor can teinds, eſpecially when tranſmitted as a ſeparate eſtate, be diſtinguiſhed from other heritable property.

The limitation of a ſervice, as heir of tailzie and proviſion, to ſubjects ſtrictly entailed, is far too critical, the words being with great propriety, applicable to all thoſe in which the heirs are not called in their legal order. Nor is the diſtinction better founded between ſpecial ſervices in ſubjects deſcendible to heirs at law, and ſuch as are uſed for tranſmitting entailed eſtates. The general rule is, that a ſpecial ſervice of every deſcription, includes a general one of the

the ſame character and effect, Stair, book 3. tit. 5. § 25.; Erſkine, book 3. tit. 8. § 51. The teinds, therefore, being deviſed in the ſame manner with the lands, the ſpecial ſervice, which was effectual to tranſmit the one, muſt be equally effectual to convey the other.

The Lords unanimouſly agreed that the teinds were not entailed. They were equally clear, that James Laurie's ſpecial ſervice in the lands did not carry the teinds. It was, however, ſuggeſted, that the defender, by her ſervice as heir to her uncle in the teinds, paſſing by her brother, who had been more than three years in poſſeſſion, was, in terms of the ſtatute 1695, liable *in valorem* of that ſubject.

The Lords accordingly "found the defender liable *in valorem* of "the teinds."

Lord Ordinary, *Hailes.* Act. *G. Wallace, Honyman.* Alt. *Wight, Rolland.*
Clerk, *Home.*

C.

N° CXLIX. *February* 25. 1784.

Poor JAMES DARG,

AGAINST

JOHN GORDON and Company.

PRIZE.—*Obligation on the Owners of a Ship to redeem the Ranſomer.*

JOHN GORDON and Company employed John Barclay to navigate a veſſel belonging to them from Peterhead to Sunderland, with inſtructions, in the event of a capture, "to make the beſt bargain "he could to ranſom, from L. 50 to L. 80 Sterling, but not above." John Barclay being taken by a French privateer, agreed to ranſom the veſſel at 150 guineas; and James Darg, a boy then on board, making what is called a trial-voyage, and entitled to no wages, conſented to go as hoſtage.

Upon the veſſel's being brought back to Peterhead, ſhe was appretiated upon oath, and ſold by the owners, by public auction, for L. 71 Sterling. They then inſiſted, that the maſter had exceeded his powers, by agreeing to a ranſom beyond the value of the ſhip; and at length, prevailed on the proprietors of the privateer to diſmiſs the hoſtage, upon receipt of 100 guineas.

In this manner the hoſtage, inſtead of five weeks, which was the time fixed for his redemption by the ranſom-contract, was confined

at Dunkirk for one year and four months. Upon his return to Scotland, he brought an action againſt the owners, for wages during the period of his confinement, and for a certain ſum of money in name of *ſolatium*.

The Lord Ordinary "found the purſuer entitled to a reaſonable "conſideration for his loſs of time during the firſt five weeks of his "confinement, within which time he ought to have been redeemed; "but that in reſpect his confinement for that period was by his own "conſent, he was entitled to no damages for that period; that his "after detention in priſon being chargeable upon the owners, they "were liable to him in damages on that account, and likewiſe in a "*ſolatium*, on account of his being ſo long confined in priſon by their "fault, during which time he might have earned wages, and, what "was more valuable to him, the knowledge of his trade: Alſo, that "the ſums modified on the above grounds, were not to be compen-"ſated on account of the maintenance, cloaths, and medicines, fur-"niſhed to him while in priſon, nor on account of the money ex-"pended in ſupporting him in his journey from Dunkirk to Peter-"head."

In reclaiming againſt this judgment, the defenders argument was intended to ſhow, that the owners were not obliged to redeem in terms of a ranſom bill, where the redemption-money exceeded the value of the ſhip; in ſupport of which propoſition, they quoted Magens, vol. 2. p. 231.; Poſtlethwaite, p. 136.

The Lords had no regard to the principles urged for the defenders, which, however available in a queſtion between the owners and captors, could not impair the claim of indemnification competent to the ranſomer. It was likewiſe obſerved, that the owners had precluded themſelves from every plea of that ſort, by neglecting to make a formal abandon of the veſſel the moment they were acquainted with the capture.

"The Lords adhered."

Lord Ordinary, *Juſtice-Clerk.* Act. *Cay*, and *Lawyers for the Poor.* Alt. *Abercromby.* Clerk, *Home.*

C.

N CL.

N° CL. *March* 3. 1784.

PATRICK STEWART and others,

AGAINST

ROBERT VANS-AGNEW.

TAILZIE.—*Mutual Entail, impoſing its reſtraints on the Granters, not good againſt Creditors.*

JOHN VANS of Barnbarroch, married a daughter of Robert Agnew of Sheuchan. Afterwards a contract was executed, one part of which was, an entail by Mr Agnew, of his eſtate, upon his daughter and her huſband, their iſſue, and a ſeries of other heirs in ſubſtitution; and the counterpart, a deſtination by Mr Vans, in the ſame terms, reſpecting his lands. This mutual tailzie contained conditions prohibiting the granters as well as the heirs from alienating the lands, or affecting them with debt, which were guarded by the uſual irritant and reſolutive clauſes. It was farther completed by infeftment.

Stewart, and other creditors of Mr Vans, having inſtituted againſt Robert Vans-Agnew his ſon, and the firſt heir of the entail, an action of reduction of that deed,

Pleaded: The efficacy of entails, in general, might juſtly have been queſtioned before 1685. By the ſtatute indeed which paſſed in that year, every doubt on this head was removed, and validity imparted to entails; but it was to thoſe only which correſpond to the deſcription of the enactment, or in the ſtructure of which its directions are obſerved. Theſe, therefore, are now the only valid entails; the effect of them at common law (of ſuch, at leaſt, as like the preſent, are made real by infeftment) being thus precluded. Now an entail which impoſes fetters on the entailer himſelf, is evidently no object of the ſtatute under conſideration, the expreſs terms of which excluſively refer to the limitations of property in the perſon of heirs, alone; a diſtinction of the moſt important kind, ſince it is obvious, what dangerous ſources of fraud would otherwiſe be opened up.

Anſwered: The contract in queſtion was an onerous deed, the one entail being made in conſideration of the other; and the power of executing ſuch a bargain ſeems to be inherent in the right of property.

Obſerved on the Bench: In order to render entails effectual, it is neceſſary that the right of the contravener ſhould be *reſolved;* in which caſe the ſtatute directs the next heir of tailzie, "to ſerve himſelf

" ſelf heir to him who died laſt infeft in the fee, and did not con-
" travene ;" a proviſion totally inconſiſtent with the predicament of an entailer impoſing reſtraints upon himſelf. As to the tailzie in queſtion being a mutual contract, the ſole effect of that circumſtance is to bar revocation *ad libitum ;* agreeably to the deciſion reſpecting the entail of Macculloch of Barholm.

The Lord Ordinary having reported the cauſe to the Court,

The Lords found " that the entail was not effectual againſt any of " Mr Vans's creditors."

Reporter, *Lord Juſtice-Clerk.* Act. *Maconochie.* Alt. *Honyman.*
Clerk, *Home.*

S.

N° CLI. *March* 3. 1784.

JOHN BUCHANAN,

AGAINST

DUNCAN MALCOLM.

PLANTING AND INCLOSING.—*Whether the Act* 1685, *cap.* 39. *applies to natural Woods.*

SOME oak trees, which formed part of a clump of natural wood belonging to Mr Buchanan, having been unwarrantably cut down by Malcolm, the former ſued the latter in an action before the ſheriff of the county, for the penalties enacted by the ſtatute of 1685, c. 39.

The judgment of the ſheriff was this : " In reſpect it appears, that " the trees libelled were not planted trees, but grew in a natural " wood, from ſtools or roots of trees that had been formerly cut, or-" dains the purſuer to inſtruct the value of the trees libelled, at the " time of their being cut by the defender, and what value they " might have riſen to, had they been allowed to grow to maturity."

The purſuer complained of the ſheriff's judgment by bill of advocation ; which was "refuſed" by the Lord Ordinary on the bills. But he having reclaimed to the Court,

The Lords ſeemed to conſider the above-mentioned act of Parliament as not excluſively applicable to planted trees, but as likewiſe relating

lating to natural woods; and accordingly they "altered the Lord "Ordinary's interlocutor, and *passed* the bill of advocation."

Lord Ordinary, *Henderland.* Act. *A. Abercromby.* Alt. *Maconochie.*
Clerk, *Home.*

S.

N° CLII. *March* 3. 1784.

ALEXANDER ROBERTSON, and others,

AGAINST

GEORGE RANKEN.

SERVITUDE. *The proprietors of the upper ſtories of a tenement have not an implied ſervitude on thoſe below, to the effect of preventing the owners of the laſt from making ſuch alterations on their reſpective parts of the walls as do not endanger the reſt of the building.*

MR ROBERTSON and others, were proprietors of the upper ſtories of a tenement, the ground-floor of which belonged to Ranken. Purpoſing to ſtrike out ſome new doors and windows in that under part of the wall, Ranken applied for the authority of the Dean of Guild's Court, which appointed a viſitation of tradeſmen, in order to aſcertain whether the propoſed alteration would be attended with any danger to the building. The other proprietors, conceiving that however innocent ſuch an operation might be, and however advantageous to the party, yet not being juſtified by neceſſity, it was illegal without their conſent, brought the Dean of Guild's ſentence under review by advocation, and

Pleaded: Wherever a tenement conſiſts of ſeveral ſtories, belonging to different proprietors, it is implied in the right of each, that without his conſent no material alteration that is not neceſſary can be lawfully made on the plan of the building in general; becauſe that right comprehends this as well as other circumſtances of his property. Thus the various owners come to have a mutual or common intereſt in all the different portions of the fabric; which, if it be not ſo extenſive as the right of property, is not on that account the leſs entitled to protection. As having then a common intereſt in Mr Ranken's part of the wall in queſtion, the other proprietors claim the power of putting a negative on his intended proceeding, by which ſo great an innovation would be effected; their title to exert that authority being recogniſed both in the Roman law and in the law of

Scotland; l. 8. b. 27. § 1. l. 40. D. *de ſervitud. præd. urban.*; Bankton, vol. 1. p. 677. § 11.

Anſwered: That the common right which has been now ſuppoſed, cannot be a right of property, is obvious. If it exiſted at all, it would be of the nature of a ſervitude. But the ſervitude *oneris ferendi* is the only one the law knows in ſuch circumſtances, l. 24.—l. 33. D. *de ſervitud. præd. urb.* Stair, b. 2. tit. 7. § 6.; and therefore the foundation of the oppoſite party's pretenſions is altogether imaginary; for the authorities quoted to ſupport them relate only to the right of common property.

The Lord Ordinary "repelled the reaſons of advocation, and remitted the cauſe in common form." And having adviſed a reclaiming petition, with anſwers,

The Lords "adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Weſtball.* Act. *Rolland.* Alt. *Maconochie.* Clerk, *Menzies.*

S.

N° CLIII. *March* 10. 1784.

JOHN BELL,

AGAINST

JOHN HENDERSON.

TUTOR.—*The appointment of a factor* loco tutoris *falls by the ſervice of the tutor-of-law.*

JOHN HENDERSON was appointed factor *loco tutoris* to the infant grandchildren of John Bell, and continued in the office for ſeveral years. Afterwards John Bell *expede* a ſervice, as tutor-of-law to his grandchildren, of which John Henderſon brought a ſuſpenſion. The reaſons were, the delay of the agnate in claiming the tutory, his great age, his reſidence in England, and having entered into a ſecond marriage.

The Lords repelled the reaſons of ſuſpenſion.

Lord Ordinary, *Hailes.* Act. *G. Wallace.* Alt. *Honyman.* Clerk, *Menzies.*

C.

CLIV.

N° CLIV. *March* 10. 1784.

ELISABETH ROSE,

AGAINST

JAMES ROSE.

CLAUSE.—"*Heirs whatſoever*," *how interpreted.*

REPRESENTATION. *Whether a ſervice as heir-male comprehends the character of heir of line, when not neceſſarily implied, though apparent from the evidence adduced to the inqueſt.*

THE inveſtitures of the barony of Kilravock had been long deviſed in favour of heirs-male, when, after expeding a charter in the ſame terms in 1771, Hugh Roſe, the proprietor, in order to create certain freehold qualifications, diſponed the property of thoſe lands to his brother "Lewis Roſe," (an old man who had never been married,) "and the heirs-male of his body; whom failing, to return to "himſelf, and *his heirs and aſſignees whatſoever*;" and divided the ſuperiority among four different diſponees, "in liferent," the fee being taken "to himſelf, and his heirs and aſſignees whatſoever." In one of thoſe conveyances, it is to be remarked, the deſtination of fee having been framed "to him and his heirs-*male* and aſſignees what-"ſoever," the word *male* was deleted before the ſigning of the deed, and the eraſure noticed in the teſting clauſe.

Upon Mr Roſe's death, however, his ſon, the late Hugh Roſe of Kilravock, *expede* a ſervice, in the character of his heir-male, and obtained from the Crown a charter of reſignation, deviſing the eſtate to himſelf, "hæredibuſque maſculis ex ejus corpore, hæredibuſque maſ-"culis ex eorum corporibus; quibus deficien. proximis ejus legiti-"mis hæredibus *maſculis* et aſſignatis quibuſcunque." He afterwards conveyed a part of the ſuperiority to a new diſponee, in the room of one who in the mean time had died, "in liferent, and to himſelf, "and the heirs-male of his body, whom failing, to his neareſt and "lawful *heirs-male* and aſſignees in fee."

A reconveyance of the property by Lewis Roſe was then to be effected; and a deed framed for that purpoſe was extended, with deſtination, after heirs-male of Hugh Roſe's body, "to his heirs-male 'and aſſignees whatſoever." The deed, however, was never executed, that clauſe having been eraſed; and in place of the ſubſtitution in favour of heirs-*male*, the words, "to heirs and aſſignees whatſoever," were firſt added on the margin, and afterwards the following clauſe: "To and in favour of the ſaid Hugh Roſe of Kilravock, my ne-"phew, and the heirs male or female of his body; whom failing,

"to

" to his other neareſt and lawful heirs male or female, and aſſignees " whatſoever." Accordingly another deed, drawn up in thoſe terms, was executed by Lewis Roſe.

The late Mr Roſe of Kilravock having died without iſſue, James Roſe, his couſin, made up titles to that eſtate as heir-male; and on the other hand, his ſiſter, Eliſabeth Roſe, who was ſerved heireſs of line to him, claimed the lands in this laſt character, inſtituting a proceſs of reduction of James's titles.

Pleaded for the Purſuer: The reſpective claims relative to the ſuperiority and to the property are to be ſeparately conſidered. 1. The deviſe of the ſuperiority by Hugh Roſe the elder, in favour of " heirs what- " ſoever," eſpecially when illuſtrated by the circumſtance of the word *male* being eraſed from the deſtination muſt preclude the title of an heir-male. By the appellation of " heirs whatſoever," thoſe of line are moſt properly and moſt frequently denoted, agreeably to the determination of the Court in the competition between the Duke of Hamilton and Mr Douglas in 1762; and it is only when forced from its natural interpretation, by occurring in an acceſſory deed, very different from that in queſtion, or by the influence of other peculiar circumſtances, that it has been made to comprehend heirs-male. The ſervice of Hugh Roſe the younger then, being in the character of heir-male, could not veſt him with the right of this ſubject; 21ſt June 1738, Edgar *contra* Maxwell, Dict. of Deciſ.; although indeed, if his being likewiſe heir of line had been neceſſarily implied in that character, which it evidently was not, his title might perhaps have been ſuſtained; as in the caſe of Bell *contra* Carruthers, 21ſt June 1749, Remark. Deciſ.; and likewiſe in that of Haldanes *contra* Haldanes, 27th November 1766. If then the laſt mentioned Mr Roſe made any deſtination of the ſuperiority in favour of heirs-male, it is to be conſidered as of no avail, having proceeded *a non habente poteſtatem*.

2. The above argument is applicable to the property as deviſed in the diſpoſition to Lewis Roſe, by the condition of return " to the " heirs whatſoever" of Mr Roſe elder of Kilravock. But a ſtrong additional plea ariſes from the terms of Lewis Roſe's reconveyance, ſo ſtudiouſly amended in its deſtination; a deed which, like a diſpoſition to a purchaſer and a ſeries of heirs, or a bond ſecluding executors, granted by a debtor, muſt have the ſame effect in regulating ſucceſſion, as a formal ſettlement by the acquirer himſelf. Nor can a preſumption founded on the preceding inveſtiture throw any obſcurity upon the clear import of the words, " neareſt heirs male or fe- " male," which are contained in the latter part of that deviſe; ſince in the former part the male ſucceſſion is plainly relinquiſhed by the nomination of the heirs-female of Hugh Roſe's body.

Anſwered: 1. With reſpect to the ſuperiority: The charter obtained by Hugh Roſe the elder, contained, as did the prior inveſtitures, deſtination to heirs-male; and the diſpoſitions of liferent, on which the oppoſite argument is founded, and which expreſs the deviſe of the fee by the appellation, " heirs whatſoever," were completed by infeft-

ment

ment taken upon that very charter. If, however, "heirs whatſoever" be not here underſtood for "heirs-male," then infeftment muſt have been given to a ſet of heirs different from that which the charter, its warrant, has pointed out. Can there be a ſtronger reaſon for fixing the application of a term, the meaning of which, it is admitted, is ſo flexible? Nay, the juſt interpretation has in effect been confeſſed by the purſuer, becauſe it is evident that the object of thoſe conveyances intitles them not to the importance of even acceſſory deeds. As to the conſtruction of the phraſe in general, that it ought to be agreeable to antecedent inveſtitures, is apparent from the following deciſions and authorities: Marquis of Clydeſdale *contra* Earl of Dundonald, 26th January 1726, Dict. of Deciſ. *voce* Succeſſion; Burnet *contra* Burnet, 28th June 1765, Fac. Coll. Skene *contra* Skene, 31ſt July 1725, Edgar; Stair, b. 3. tit. 5. § 12.; Bankton, vol. 2. p. 330. § 27.; Erſkine, p. 551. § 20.; Mackenzie on Tailzies, p. 284.

But though heirs of line had been denoted by the above appellation, even that circumſtance would not have prevented the ſubject from being carried by the ſervice of Hugh Roſe the younger, as heir-male; ſince the ſpecial facts proved before the inqueſt aſcertain, not leſs clearly, his character of heir of line; according to the deciſion in the caſe of Bell *contra* Carruthers, cited by the purſuer, Remark. Deciſ. 21ſt June 1749.

2. With regard to the property of the eſtate ſubfeued to Lewis Roſe by Hugh Roſe the elder, the clauſe of return contained in that nominal conveyance is to be underſtood of heirs-male; the juſt conſtruction of the words, "heirs whatſoever," which occur there likewiſe, having been already ſhewn. Lewis Roſe was not left at liberty, in his rediſpoſition, to depart from the line thus marked out to him. Such clauſes in ſettlements made in favour, not of natural heirs, but of perſons *non alioqui ſucceſſuri*, create a *jus crediti* which is not defeaſible by any gratuitous deed of theirs; 18th February 1717, Duke of Douglas *contra* Lockhart of Lee; 26th January 1726, Marquis of Clydeſdale *contra* Earl of Dundonald; 9th December 1762, Duke of Hamilton *contra* Duke of Douglas. Hence, whatever the import may be of the deviſe contained in that reconveyance, its effect muſt be limited by the preceding deſtination. The appellation indeed of "neareſt heirs "male or female," is truly ſynonymous with that of "heirs what-"ſoever," of which it is only a ſort of paraphraſe; and therefore the ſignification of both expreſſions alike is to be regulated by the prior inveſtitures.

The Lord Ordinary's interlocutor was the following: "Finds, That "the deeds and conveyances founded on by the purſuer are not ſuf-"ficient to alter the ſettlements and inveſtitures of the eſtate in fa-"vour of heirs-male; and therefore aſſoilzies the defender from "this proceſs." But upon adviſing a reclaiming petition and anſwers,

The Court "*ſuſtained* the reaſons of reduction of the writings li-"belled on, ſo far as concerns the *property* of the lands and barony

" of Kilravock; but *repelled* the reaſons of reduction as to the ſupe-
" riority thereof."

Mutual reclaiming petitions having then been preferred, and followed with anſwers,

The Lords adhered to their former interlocutor, ſo far as related to the property, but altered it with regard to the ſuperiority, having ſuſtained the reaſons of reduction reſpecting the ſuperiority as well as the property.

Lord Ordinary, *Gardenſton.* Clerk, *Menzies.* Act. *Wight, G. Fergusſon.* Alt. *Maclaurin, Blair.*

S.

N° CLV. *June* 15. 1784.

Earl of PETERBOROUGH,

AGAINST

Mrs MARY GARIOCH.

PLANTING AND INCLOSING. *The act* 1661 *not to be extended to the caſe of a conterminous tenement, where the charges of incloſing would not be compenſated by the reſulting improvement.*

THE Earl of Peterborough, as proprietor of an eſtate ſituated in Kincardineſhire, preferred to the ſheriff of that county a petition, ſetting forth his intention of incloſing his grounds, in order to improve them; and praying, that Mrs Garioch, the conterminious heritor, might, in conſequence of the ſtatutes of 1661, cap. 41. and 1685, cap. 39. be found liable in a half of the charges of the march-fence. Mrs Garioch made anſwer, that her property, though of large extent, was mountainous and barren, and yielded but a ſmall rent; and of courſe, that the expence of the propoſed incloſure of lands, which could not be meliorated by that operation, would, however little her more opulent neighbour might feel it, be a burden far too heavy for her circumſtances to bear.

The ſheriff having "found that the act 1661 did not apply to the " caſe," Lord Peterborough brought that judgment under review, by advocation.

Pleaded for the purſuer: The object of the act of parliament of 1661, was not ſo much the private emolument of individuals, as the benefi

benefit of the public at large. This appears by the declaration contained in the preamble of that ſtatute, and is illuſtrated by its ſubſequent tenor. Hence the ſtatute has not directed judges to inquire into the comparative advantage immediately reſulting from incloſure to the parties concerned; nor has it authoriſed them to determine, whether, in particular caſes, equity might oppoſe the effect of a law framed for a national purpoſe. If, therefore, one conterminous proprietor be deſirous to improve his grounds, the other will not be permitted to withhold his ſhare of the expence of incloſing, however contrary that meaſure may be to his inclination, or even to his intereſt. Thus, though that expence would, to an heritor who had already ſet his lands in leaſe for ninety-nine years at a fixed rent, be juſt ſo much certain loſs; yet, without regard to his peculiar circumſtances, even he, under the authority of the ſtatute, has been found liable to contribute. The preſent caſe, far leſs favourable on the part of the defender, is ſimilar to that of Riddel *contra* Marquis of Tweeddale, 5th December 1769, determined on the principles ſtated above.

Anſwered: That argument repreſents the ſtatute in queſtion in a ſingular light; as framed by a wiſe Legiſlature, not for the benefit, but the oppreſſion or the ruin of its ſubjects. Such, in a conſiderable degree, would be the conſequence of enforcing its application to the preſent caſe. No lawyer, however, has thus interpreted that law; and Mr Erſkine, in particular, obſerves, that it ought never to be ſo extended as to become "a cover for oppreſſion," b. 2. tit. 6. §4. The caſe of Riddel *contra* Marquis of Tweeddale is no example to the contrary; for there, of two tenements, the incloſing of one only yielded mutual advantage, and to that the judgment of the Court was confined.

This queſtion was reported by the Lord Ordinary.

The opinion of the Court was, that this act of parliament ought to be interpreted as reſpecting caſes in which mutual, though not therefore equal advantages were to accrue to the conterminous tenements; and as in no inſtance authoriſing an act of oppreſſion, or of injuſtice to any individual. Accordingly,

The Lords ſuſtained the defence.

Reporter, *Lord Gardenſton.* Act. *Lord Advocate.* Alt. *Blair.* Clerk, *Orme.*

S.

N° CLVI.

N° CLVI. *June* 16. 1784.

ROBERT MUTTER,

AGAINST

Earl of SELKIRK.

MANSE. *A miniſter of a pariſh, partly landward and partly conſiſting of a royal borough, is not intitled to demand the building of a manſe, but may claim a ſum for houſe-rent.*

THERE being no manſe for the miniſters of Kirkcudbright, the heritors of that town and pariſh had been long in the uſe of allowing to them for houſe-rent 100 merks yearly; and to Mr Mutter, the preſent incumbent, they have given L.15 Sterling on that account. In a late proceſs of augmentation, the Earl of Selkirk, the principal heritor, moved the court of teinds to include in their decreet a ſpecial decerniture for the laſt-mentioned annual ſum; but the Lords Commiſſioners, doubting their juriſdiction in that particular, reſerved to him the 100 merks only, ſo long enjoyed by his predeceſſors. The payment of the L. 15 having been afterwards with-held, Mr Mutter made application to the preſbytery for a decree ordaining a ſufficient manſe to be built; upon which they decerned the heritors to make payment of L. 355, 2s. for that purpoſe. The Earl of Selkirk having brought a ſuſpenſion of the charge that followed againſt him,

Pleaded: By the ſtatutes which paſſed in 1563, in 1572, in 1592, and in 1593, proviſion for manſes and glebes was made to the reformed clergy out of thoſe of the ancient parſons and vicars, and from the poſſeſſions of abbeys and cathedral churches; and, with reſpect to glebes in particular, out of any church-lands whatever within each pariſh. It was not until the uſurpation, that by ſtatute of 1644 the right to manſes and glebes was declared, even where there had been previouſly no eccleſiaſtical poſſeſſions. That act, however, expreſsly excepts *borough-town kirks;* and though the ſubſequent ſtatute of 1649 extends the proviſion to pariſhes partly conſiſting of borough and partly landward, both theſe laſt-mentioned enactments have been reſcinded; while the ſtatute of 1663, ordaining the building or the reparation of manſes, is confined to country pariſhes. The claim therefore of the charger, who is miniſter of a royal borough, is not warranted by law.

Anſwered: Miniſters of pariſhes that comprehend landward diſtricts, ſuch as Kirkcudbright, are by law intitled to manſes; whatever may be

be the caſe of thoſe miniſters whoſe pariſhes conſiſt wholly of royalty. The ſtatute of 1663 is general, and reſpects landward heritors equally, whether the pariſh includes a royal borough or not. Accordingly, it refers to this difference among boroughs-royal, that of ſome the miniſters have, and of others have not right to a glebe; thus plainly indicating there being a landward diſtrict in the firſt inſtance, and none in the ſecond.

Obſerved on the Bench: It is not to be expected, that miniſters ſhould find in the country proper houſes, if not built on purpoſe for them; but in royal boroughs they may always obtain fit habitations. Of courſe it is to landward pariſhes that in this reſpect the ſtatute of 1663 relates. Sometimes indeed boroughs-royal do give manſes to their miniſters; and if the charger were in poſſeſſion of one, he ought to be permitted ſtill to retain it. But more frequently, as in the preſent inſtance, miniſters in towns are allowed a certain annual ſum for the renting of a houſe.

Upon a report of the caſe by the Lord Ordinary,

The Lords "ſuſpended the letters; reſerving to the miniſter to inſiſt for a competent houſe-rent."

Reporter, *Lord Alva.* For the charger, *G. Wallace.* Alt. *Wight.* Clerk, *Home.*

S.

N° CLVII. *June* 16. 1784.

HUGH FRASER,

AGAINST

FRASER DAVIES.

PROVING OF THE TENOR—*of holograph writings.*

HUGH FRASER, to whom an eſtate in Scotland had been deviſed, upon the failure of heirs-male of Lady Erſkine, the mother of Fraſer Davies, brought an action for declaring the illegitimacy of the latter, founded on an allegation, that Thomas Davies, huſband to Lady Erſkine, and father of Fraſer Davies, had been antecedently married to Eliſabeth Nugent.

In ſupport of this action, Mr Fraſer, *inter alia*, referred to a certificate and two miſſive letters, ſaid to be holograph of Thomas Davies,

 which

which contained an acknowledgement of his former marriage. Copies of these writings were preserved in a process of declarator of marriage, which had been instituted by Elisabeth Nugent before the Commissaries of Edinburgh; but the originals had been taken out of the process by her, and never restored.

Mr Fraser Davies, the defender, brought an action of reduction-improbation, in which these writings were called for, under the usual certification; and Mr Fraser, in order to obviate that action, insisted in another for proving their tenor.

The original action, which called in question the legitimacy of a person more than thirty years after his birth, was viewed in an unfavourable light. And some of the judges doubted how far the removal of the writings by the party principally concerned, could be sustained as a proper *casus amissionis*, in favour of one who had only a collateral interest. But the chief ground of the decision seemed to be the peculiar nature of the proof requisite in the action of proving the tenor; with regard to which it was

Observed on the Bench: A proving of the tenor is a useful, but at the same time a dangerous remedy; since without due attention, it may give an opportunity of raising up valid and effectual documents, in the place of informal or of forged deeds. It has therefore been wisely provided, that the evidence to be adduced by the pursuer shall not be confined to the *tenor* of the writings, but shall at the same time establish their *authenticity;* Stair, book 4. tit. 32. § 5. 9. Thus, with regard to holograph deeds, it is not enough for the pursuer to prove, that writings of the purport libelled had once existed. Had they been extant, it would have been incumbent on him to have likewise shown, that they were the genuine hand-writing of the party, and subscribed of the dates which they are said to have borne. Erskine, book 3. tit. 2. § 22.; Dictionary, vol. 2. p. 258. *voc.* Proof. Here then the present action must be for ever ineffectual, because from the disappearance of the writings themselves, such a proof cannot now be obtained.

The judgment of the Court was in these words:

"The Lords, having considered the whole circumstances of the "case, dismiss the action."

Lord Ordinary, *Eskgrove.* Act. *Maclaurin, A. Fergusson.* Alt. *Henry Erskine.*
Geo. Fergusson. Clerk, *Robertson.*

Nota. Notwithstanding this decision, the judges who spoke expressed their opinion, that even after decreet obtained in the action of reduction-improbation, Mr Fraser would be intitled to found on the letters in question, though not as holograph deeds, yet as a circumstance of evidence.

C.

N° CLVIII.

N° CLVIII. *June* 18. 1784.

JAMES SPENCE,

AGAINST

WALTER SPENCE.

WRIT. *An intermediate diſtinction adopted between formal writings proved to be falſe, and ſuch as are probative and actionable.*

IN this caſe the Court found, that a writing, though in the proper form of a bill, and though not proved to be falſe, yet could not, from the circumſtances in which it appeared, be ſuſtained as probative, or as a ground of action.

Act. *H. Erſkine.* Alt. *M. Roſs.* Clerk, *Menzies.*

S.

N° CLIX. *June* 23. 1784.

The HERITORS of the Kirk-lands in the Pariſh of PEEBLES,

AGAINST

WILLIAM DALGLEISH.

GLEBE.—*Miniſter's graſs.—Incorporate acres.*

THE miniſters of Peebles having never obtained a deſignation of paſturage, in terms of the ſtatute 1663, c. 21. the preſbytery allocated to Mr Dalgleiſh, the preſent incumbent, a piece of land called the Kirkmyre, formerly part of the vicar's glebe, which, on the eve of the Reformation, had been feued out in ſmall diviſions to the inhabitants of the burgh.

As the ſpot thus choſen by the preſbytery was marſhy, and often covered with water for a great part of the winter ſeaſon, it had never been in tillage; nor was it frequently uſed in paſture, the graſs which grew upon it having been either cut green or made into hay.

In a reduction of the decreet of the preſbytery,

The

The Heritors pleaded: The deſign of the ſtatute 1663 was not ſo much to add to the income of the perſon ſerving the cure, as to accommodate him with a ſpot of ground, on which a horſe for his own uſe, and two cows for that of his family, might feed. For this reaſon, the allocation is to be made of paſture-grounds; and in caſe of there being within the pariſh no kirk-lands of that kind, the heritors are to make payment annually to the miniſter of L. 20 Scots, which, at the time of the enactment, would have procured the requiſite quantity of paſture. It never could be the mind of the Legiſlature, therefore, to authoriſe the deſignation of lands like thoſe in diſpute, which are in a great meaſure unfit for that uſe, and have been hitherto converted to other purpoſes.

2dly, The ſtatute itſelf prohibits the allocation "of incorporate "acres in villages and towns," under which deſcription the lands in queſtion may with great propriety be comprehended. The exception cannot be confined to lands contained in the charter of erection of a royal borough, though theſe alone, in accurate language, be ſtyled incorporated; the ſtatute having expreſsly extended it to villages, which are diſtinguiſhed by no corporate privileges. The reaſon, too, of this humane exemption, which was to preſerve the grounds in the vicinity of towns, employed by the inhabitants in feeding their cows, and for other neceſſary uſes, can no where be urged with greater juſtice than in the circumſtances of this caſe.

Anſwered: The diſtinction intended by the ſtatute under conſideration, was not between one kind of paſture-grounds and another, but between arable lands, or what were in a ſtate of conſtant cultivation, though ſometimes yielding green crops, and lands which either had never been ploughed, or were cultivated at ſtated times only, and after having been in paſture for ſeveral years; Kilkerran, 1748, Sir William Dalrymple *contra* Steele; 27th February 1756, Hodges *contra* Bryce; 26th June 1778, Grierſon *contra* Ewart. Thus the lands in queſtion, never having been in tillage, were the proper ſubject of allocation, though, from the natural humidity of the ſoil, they may be ſomewhat leſs commodious than if they had been more dry; a circumſtance of which the miniſter alone is intitled to complain.

2dly, The exception in the ſtatute does not regard all incorporated lands, but only ſuch as are poſſeſſed as gardens, or covered with houſes. Even in theſe it does not altogether exclude the incumbent from the benefit of an allocation, but gives to the heritors an alternative, of furniſhing him "with other lands neareſt the kirk." In truth, the lands in queſtion, never having been incorporated, belonging to no corporation, and being held, not in burgage, but by feu tenure, cannot be thought to fall within the exception.

"The Lords aſſoilzied from the reduction."

Lord Ordinary, *Kennet.* Act. Lord Advocate (*Campbell*), *J. W. Murray.*
Alt. *H. Erſkine.* Clerk, *Menzies.*

C.

N° CLX.

N° CLX. *June* 23. 1784.

JAMES GORDON,

AGAINST

WILLIAM BOGLE.

JURISDICTION—*of the High Court of Admiralty in Bills of Exchange.*

PRESCRIPTION.—*Interruption by Blank Citation,—by uſing Diligence againſt one of ſeveral Co-obligants.*

JAMES GORDON purſued William Bogle before the Judge of the High Court of Admiralty, for payment of a bill of exchange, accepted, among others, by John Bogle, to whom the defender had ſucceeded as heir.

The admiral-precept, or warrant for citation, according to the uſual form in that judicatory, made no mention of any particular debt; and before the action had been called in Court, when, for the firſt time, the libel was filled up, and the bill ſpecified as the foundation of the claim, ſix years had elapſed from the term of payment.

The Judge-Admiral found the defender liable; who removed the cauſe, by a bill of advocation, into the Court of Seſſion, and

Pleaded: The preſent claim, however, vouched by a document, originally introduced, and moſt commonly uſed among merchants, was the reſult, not of a mercantile tranſaction, but of a cautionary interpoſition by the debtors, who were landed gentlemen, in favour of a perſon of the ſame rank. The implied contract, too, ariſing from the defender's behaviour as heir, from which an endeavour is made to ſubject him to this debt, has not the moſt diſtant relation to trade. To the cognizance of matters ſuch as theſe, the High Court of Admiralty was altogether incompetent, the concurrent juriſdiction aſſumed by it in cauſes not maritime, being ſtrictly limited to thoſe of a mercantile nature; Dictionary, *voce* Juriſdiction.

Nor were the proceedings in that Court, though competent to the trial of this claim, a proper interruption of the ſexennial limitation of bills of exchange. The negative preſcription is not founded merely on a ſuppoſed dereliction by the creditor. The law preſumes the debtor to have paid the debt, but to have neglected to preſerve for ſo long a period the vouchers of his acquittance. Hence it is not enough that the claimant, within the limited time, has indicated a reſolution to demand payment. The other party muſt likewiſe be made acquainted with that purpoſe, and thereby be put on his guard, ſo as

he may ſecure thoſe writings which are neceſſary for his releaſe. Thus the regiſtration of a deed, Erſkine, b. 3. tit. 7. § 38.; the iſſuing of letters of horning, without a charge againſt the debtor, Dalrymple, 177.; or the voluntary conveyance of the debt, have been found not to interrupt preſcription; Kames's Elucidations, art. 23. § 344. On the ſame principle, a general charge to enter heir, Bankton, b. 2. tit. 12. § 57.; an arreſtment, Fount. 16th February 1699, Menzies *contra* Forbes; and an action of mails and duties purſued by an adjudger on a truſt-bond, 14th December 1742, Scott *contra* Lord Napier, do not ſave from preſcription; becauſe they convey no ſort of interpellation with regard to any particular debt.

A ſummons executed before it is libelled, or what is called a blank citation, cannot be attended with ſtronger effects. When allowed by the forms, it may ſerve to intimate to the party cited, that a claim is to be brought againſt him, but cannot afford information either of its nature or of its extent. Accordingly, even when that mode of procedure was uſed in the Court of Seſſion, it never was ſuſtained as an interruption of preſcription; Kilkerran, 30th November 1739, Macdougal *contra* Macdougal.

Anſwered: Bills of exchange, from whatever tranſaction they may have originated, are conſidered as mercantile vouchers, and on that account exempted, in every inſtance, from the ſtatutory ſolemnities which are requiſite in other writings. In all caſes, therefore, they may be competently tried before the High Court of Admiralty, which by inveterate uſage, confirmed by deciſions in the courts of review, has acquired a juriſdiction in every queſtion of a mercantile nature; Fount. 19th July 1706, Anderſon *contra* Turnbull; Kilkerran *voce* Juriſdiction. Nor could the juriſdiction of the Judge-Admiral be taken away by the death of one of the parties; otherwiſe, in matters ſtrictly maritime, which are excluſively appropriated in the firſt inſtance to his cognizance, the death of the debtor would at once put an end to the ground of action. An heir, in the contemplation of law, is the ſame perſon with the predeceſſor, and to him debts, as well as rights, are tranſmitted, without the ſmalleſt alteration.

The practice of executing a ſummons, containing no ſpecification of the purſuer's claim, is apparently inconſiſtent with the chief deſign of that form, which is, to enable the party cited to prepare his defence; and for this reaſon it has been aboliſhed in all the courts in Scotland, except that of the Admiralty, the peculiar nature and objects of this juriſdiction requiring the utmoſt expedition and diſpatch. As the ſtatute 1696, c. 41. has directed all ſummonſes executed not as the commencement of an action, but for the ſpecial purpoſe of interrupting preſcription, to contain "the grounds and warrants on "which they proceed," a blank citation cannot be deemed a revival of a claim, in terms of that law. But where a proſecution of the right is intended, and the claim is regularly inſiſted in, and brought to a concluſion by obtaining decreet, it cannot be imagined that a citation, agreeable to the forms of the court from which it is iſſued, ſhould vitiate the whole proceedings. In this caſe, the bill of exchange

was

was engroſſed in the libel the moment the forms of court would admit; nor can the defender ſpecify any other claim to which the citation could poſſibly apply.

The Lord Ordinary pronounced the following interlocutor:

" In reſpect that by long uſage, approved by deciſions of this " Court, actions upon inland bills, as well as upon foreign bills of " exchange, have been rendered competent before the Judge of the " High Court of Admiralty; and that in this caſe William Bogle, de- " fender and advocator, was cited (as were alſo the other acceptors of " the bill in queſtion) upon a precept iſſued from the ſaid Court of " Admiralty, at the purſuer James Gordon's inſtance, agreeable to " the uſual form and practice of that Court, before expiry of ſix " years from the term of payment of the ſaid bill; and in which pre- " cept the bill was *after* fully libelled upon, and the proceſs called in " Court, againſt the whole perſons bound or liable for the bill, as " ſoon as the diets of compearance were paſt; and farther, that the " advocator has not alleged, that at the time of the ſaid citation " there was any ground of debt or claim ſubſiſting between the pur- " ſuer and him other than the ſaid bill, to which the foreſaid precept " and citation thereon could have applied; therefore remits the cauſe " to the Judge-Admiral."

Upon adviſing a reclaiming petition, with anſwers, in which the purſuer urged, as an additional interruption of the preſcription, that a decreet had been obtained within the ſix years againſt one of the acceptors of the bill in queſtion, the Lords pronounced this interlocutor:

" Find, That by long uſage, approved by deciſions of this Court, " action upon inland bills, as well as upon foreign bills of exchange, " have been rendered competent before the Judge of the High Court " of Admiralty: Find, That the execution upon a blank Admiral- " precept does not interrupt preſcription; but find, That the decreet " taken againſt one of the *correi*, before the ſix years were elapſed, " interrupts the preſcription as to all of them."

Lord Ordinary, *Eſkgrove.* Act. *Maclaurin.* Alt. Lord Advocate *Campbell,*
Archibald Campbell. Clerk, *Menzies.*

C.

N° CLXI.

N° CLXI. *June* 24. 1784.

ROBERT STEVENSON,

AGAINST

MARGARET BARR.

SUBSTITUTE, AND CONDITIONAL INSTITUTE. *A precept of ſeiſin denotes the conditional inſtitution of the perſon in whoſe favour it is granted.*

CLAUSE,—" *failing children*," *how interpreted.*

JOHN STEVENSON, by contract of marriage, provided Margaret Barr, his wife, in a liferent annuity; in ſecurity of which, he diſponed to her in liferent certain heritable ſubjects, deviſing the fee of them to the children to be procreated of the marriage. The following farther proviſion was then ſubjoined: " *Failing* children of the " ſaid marriage, he hereby diſpones and makes over to his ſaid ſpouſe " the foreſaid tenement;" i. e. one of the ſubjects above mentioned. And in the precept of ſeiſin, it is to be remarked, he directed that infeftment ſhould be given in the laſt mentioned tenement " to *Marga-* " *ret Barr*, and her heirs and aſſignees."

A child of the marriage exiſted, and ſurvived John Stevenſon. Its death afterwards gave riſe to a competition, reſpecting that tenement, between Margaret Barr, and Robert, the brother of John, who claimed it as heir of the child.

Pleaded for Margaret Barr: The deſtination of fee in favour of the children of the marriage ſeems to have no other effect, when followed by the expreſſion, " failing them," than if it had been ſucceeded by that of whom failing; and then undoubtedly, whether they had failed by non-exiſtence or by predeceaſe, it would have been a matter of indifference. The obvious views of the diſponer, too, are equally adverſe to any diſtinction between thoſe two events.

Anſwered: By the child's ſurviving its father it became veſted with the fee; and therefore the mother could not ſucceed but as a ſubſtitute. The terms, however, of the contract, eſpecially in the precept of ſeiſin, refer to a conditional inſtitution alone. Margaret Barr's infeftment under her huſband's precept could be of no avail after the fee had devolved to another perſon.

A majority of the Court, chiefly influenced, as it ſeemed, by the precept of ſeiſin's having been granted to Margaret Barr, conſidered her

her as a conditional inſtitute; becauſe, as it was obſerved, infeftment cannot be validly taken by ſubſtitutes in ſettlements, in virtue of the precepts therein contained; though by the reſt of the Judges, who viewed her in the light of a ſubſtitute, it was argued, that great weight ought not to be laid on that circumſtance, ſince the practice of giving ſeiſin to *nominatim* ſubſtitutes, however erroneous, was yet very frequent.

The Lord Ordinary having found, "That children of the mar-"riage between the ſaid Margaret Barr and the ſaid John Stevenſon "having failed by the death of the only child of that marriage, the "ſaid Margaret Barr is, by the terms of the contract of marriage, "entitled to the fee of the houſes ſpecially provided to her, failing "children of the marriage."

The Lords altered that interlocutor, and found, "That Margaret "Barr had no right to the fee of the houſe in queſtion;" to which judgment they adhered, upon adviſing a reclaiming petition and anſwers.

Lord Ordinary, *Swinton.* Clerk, *Home.* For Margaret Barr, *Rolland, Currie.* Alt. *Mortbland.*

S.

N° CLXII. *June* 25. 1784.

ROBERT DOW,

AGAINST

JAMES HAY.

HYPOTHEC.—*A Landlord may,* currente termino, *not only ſequeſtrate, but likewiſe roup the hypothecated effects of his tenant, if inſolvent.*

DOW was the tenant of Mr Hay in a poſſeſſion, the rent of which was partly payable in victual betwixt Chriſtmas and Candlemas, and partly in money, on 5th July.

The tenant's credit having become ſuſpected, the ſheriff, in conſequence of a petition preferred by the landlord, granted warrant on 10th November preceding, "for ſequeſtrating the defender's corn, "cattle, and other effects, and appointed a ſequeſtrator, with power "to cauſe an inventory and appriſement to be made; but without

" prejudice to the defender's applying to have the ſequeſtraton re-
" moved, upon his finding caution for payment of the rents." And on 19th January, he " granted warrant to the purſuer, at the ſight
" of the ſequeſtrator, to ſell by public roup the effects ſequeſtrated;
" at leaſt as much thereof as to pay the rents due, with the ex-
" pences of proceſs, ſequeſtration, and roup."

The tenant's effects having been rouped in conſequence of this authority, he brought the whole proceedings, as being oppreſſive and illegal, under the review of the court, by proceſs of reduction.

Obſerved on the Bench: Though a landlord's right of hypothec ought always to be exerciſed with diſcretion, yet when his tenant fails in his circumſtances, the landlord, *currente termino*, may juſtly ſequeſtrate the ſtocking on the farm. In this power, that of rouping the ſubjects, eſpecially the cattle, is implied; ſince the expence attending their preſervation might otherwiſe, in the mean time, often become equal to their value.

The Lord Ordinary " having aſſoilzied the defender,"

The Lords, on adviſing a reclaiming petition and anſwers, " adhered to the interlocutor of the Lord Ordinary."

Lord Ordinary, *Elliock.* Act. *H. Erſkine.* Alt. *Croſbie.* Clerk, *Colquhoun.*

S.

N° CLXIII. *June* 27. 1784.

The COMMON AGENT in the ranking of the CREDITORS of PINMORE,

AGAINST

JEAN and FERGUSIA KENNEDIES.

ADJUDICATION—*of a Tack ſuſtained, though the Date, the Term of Endurance, and the Granter's Name were not ſpecified.*

JEAN and FERGUSIA KENNEDIES, adjudged from Robert Kennedy of Pinmore, " All and haill a tack, dated
" of the lands of Daldowie and others, granted by
" to the ſaid Robert Kennedy, of which there are
" years ſtill to run, from the term of next to
" come."

To

To this adjudication the common agent objected, that it did not ſpecify the date of the tack, the granter of it, the term of endurance, nor the ſituation of the lands.

"The Lords repelled the objection."

Lord Ordinary, *Alva.* For Jean and Fergusia Kennedies, *George Wallace.*
For the Common Agent, *George Fergusſon.* Clerk, *Orme.*

C.

N° CLXIV. *June* 29. 1784.

JAMES MACDOWALL,

AGAINST

WALTER MACDOWALL.

NEAREST IN KIN. EXECUTOR. *Poſſeſſion of the defunct's moveables by the neareſt of kin, veſts him in the right of the ſubjects poſſeſſed only.*

PATRICK MACDOWALL was creditor in a perſonal bond. Upon his death, James, his only child, ſucceeded to him, and had an intromiſſion with his eſtate, real and perſonal, but intermeddled not with that debt.

James granted to one of his children a general diſpoſition of his effects. This diſponee having died, his ſon James Macdowall, in his right, laid claim to the bond; in which demand he, being the great-grandchild of Patrick, was oppoſed by Walter, a ſon of the elder James, and of courſe the grandſon of Patrick, and his next of kin.

The iſſue of the competition depended on this point: Whether the elder James, who *expede* no confirmation, had, by a general poſſeſſion of his father Patrick's other funds and effects, veſted himſelf with a right to the debt in queſtion, ſo as he could tranſmit it to his diſponee; or whether the debt ſtill remained *in bonis* of Patrick, deſcendible to his neareſt in kin.

Pleaded for the heir of the diſponee: In no period of our law has the right of ſucceſſion *ab inteſtato* been denied to the kindred of deceaſed perſons. The peculiarity of feudal property, in the origin of that eſtabliſhment, having circumſcribed the right which was in the anceſtors only, contradicts not this obſervation. Both in heritage and in moveables, the right of blood was equally the title of ſucceſſion; though with reſpect to the former, it was not allowed to operate

operate before it had been certified and declared by certain prescribed solemnities; while as to the latter these were not required. The course of moveable succession, however, has in fact been interrupted by the following adventitious circumstances.

Of old, the clergy were deemed the only fit depositaries of all trusts. On this principle they executed the testaments of deceased persons; or they authorised or controuled the management of the executors nominated by testators; whence arose the practice of exhibiting inventories and of the subsequent confirmation, with its quota of emolument. Of the moveable effects of those who died intestate, the bishops, by themselves, or by others of their appointment, assumed the sole disposal, under the pretence that it had been conferred on them by the presumed will of the deceased. Thus, in effect, the clergy came to succeed to all moveable effects the proprietors of which died intestate; and in this source originated the idea that the right to the *dead's part* was inseparable from the office of executor. That clerical usurpation was however gradually diminished, and at length the course of succession returned to its proper channel.

By act of parliament of 1540, cap. 120, the presumption was debarred in the case of persons dying under the age requisite for making testaments, and their next of kin were declared entitled to "their "goods, without prejudice to the Ordinary's claim of quot." That statute, which passed near the æra of the Reformation in Scotland, could not fail to be liberally interpreted; and in 1563, this article appears among the instructions given to the commissaries, "that if one die "intestate, or his executor-nominate refuse to accept of the office, "the commissaries must give the office to the nearest of kin, being "willing to confirm." In this manner, the right of the next of kin was rescued from the hands of the churchmen or their commissaries; but as, for the reason already mentioned, it still continued to be excluded by the executors whom the deceased themselves had nominated, action to account was, by act of parliament 1617, c. 14. given to the nearest in kin against them likewise; so that the latter became truly trustees or procurators for the former, who therefore acquired through them the same right as if they had acted for themselves.

Downward to the Revolution, however, the ancient influence prevailed; and without the clerical sanction, or confirmation, moveable succession was not understood fully to vest; the commissaries having it still in their power to charge the nearest of kin to confirm, or, if they failed to do so, to confirm their own procurator-fiscal in their stead. But by the statute of 1690, cap. 26. which prohibited these proceedings of the commissary court, the next of kin were finally emancipated from the ecclesiastical authority; and thus no obstacle remained to their lawfully apprehending possession of the moveable estates of their ancestors, and, on the title of propinquity, obtaining the full property of them; Essays on Brit. Antiq. p. 191. That this is now the only requisite *modus acquirendi dominii* of an ancestor's personal effects, is apparent from the decisions of the Court, relative both to the *ipsa corpora* of moveables, and to *nomina debitorum*.

With

With reſpect to the firſt, which are capable of a proper poſſeſſion, the rule was exemplified in the caſe of Shearers *contra* Wilſon, 17th December 1729, Dict. of Deciſ.; in that of Macwhirter *contra* Miller, July 1743, Kilkerr. p. 509.; and in the caſes of Baird *contra* Gray, 3d February 1744, ibid. p. 511.; of Brodie *contra* Stewart, 25th December 1757, Fac. Coll.; and of Pringles *contra* Veitch, March 7, 1769, ibid. The right of *nomina debitorum*, again, is tranſmitted either by the next of kin's receiving payment, to do which, and by conſequence effectually to diſcharge the debtor, he is unqueſtionably entitled; or by the debtor's renewing the document of debt in his name, or even by granting to him a new obligation corroborative of the original one; Spence *contra* Alcorn's Creditors, 20th February 1751, Falconar; Kilkerran; 19th June 1782, Watſon *contra* Marſhall. Fac. Coll.

But though the right of the next of kin is now independent of confirmation, that ſolemnity nevertheleſs is not ſuperſeded. It is ſtill as eſſential as ever to the office of executor, and not to be diſpenſed with by the next of kin himſelf, if he ſhall, through that medium, lay claim to the ſucceſſion; a method by which he may avoid a univerſal paſſive repreſentation. Nor is a partial confirmation ſufficient to every effect. By this indeed, (for a decreet-dative of itſelf, is not enough, 23d January 1745, Carmichael *contra* Carmichael, Falconar, Kilkerr. p. 511.), he will be inſtated in the office, which being to him a procuratory *in rem ſuam*, will deſcend, among his other *jura quæſita*, to his repreſentatives or aſſignees; Somerville *contra* Creditors of Murray, 4th December 1744, Remark. Deciſ. Kilkerr. p. 512. But a partial confirmation will not, beyond its extent, eſtabliſh him in the property of the defunct's effects. It is the confirmation only of each article which transfers it from the *hæreditas jacens*, and places it under his adminiſtration, ſubſtituting to thoſe concerned a *jus crediti* over him and his cautioners; and therefore, in the caſe of a partial confirmation by the next of kin, not completed by his repreſentatives on whom the office thereby devolved, it was found, that the reſt of the ſucceſſion might, as *in bonis* of the firſt defunct, be ſtill attached by his creditors; 27th July 1779, Sloan-Laurie *contra* Spalding-Gordon; Fac. Coll. Some of the later obſervations have been intended to obviate objections, by giving a complete view of the ſubject of this queſtion; for it is on the right of James Macdowall the elder, the next of kin of Patrick, as ſuch, and on his general intromiſſion, that the plea of the preſent competitor is founded.

Anſwered: The premiſes, in the oppoſite argument, whether true or falſe, are not concluſive. It may, however, be aſked, for what reaſon, if moveable ſucceſſion be ſo independent of legal forms, cannot the next of kin of a deceaſed creditor compel, without full confirmation, his debtor to make payment, 10th February 1784, Fraſer *contra* Gibb? Or why does the act of parliament of 1693, cap. 15. require confirmation by the next of kin, in order to his obtaining regiſtration of ſecurities granted to the defunct, or inſiſting in a proceſs inſtituted by him? Whence likewiſe, on that ſuppoſition, proceeds the known diſtinction between the intereſt of the next of kin, which does

not, and the childrens legitim and relict's ſhare, which do, *ipſo jure*, tranſmit to their repreſentatives.

The inconcluſiveneſs of the argument appears from comparing with the circumſtances of this caſe its principle, which is, that *jus ſanguinis*, as the title or *cauſa*, muſt be followed by the apprehending of poſſeſſion as the *modus acquirendi dominii*, in order to eſtabliſh the ſucceſſion in the perſon of the next of kin, ſo as it may devolve to his ſucceſſors; in the ſame manner as in heritage, the right of blood even declared by ſervice is ineffectual, without infeftment, to veſt the heir with the property, or to tranſmit it to his repreſentatives. For, as the taking of ſeiſin in one of ſeveral landed eſtates which belonged to his predeceſſor, cannot place an heir in the property of the reſt; ſo neither could poſſeſſion of the whole other funds or effects of Patrick Macdowall impart to James, his ſon, any right to the debt in queſtion.

Replied: They are not real inconſiſtencies which have been mentioned. Confirmation being the only method preſcribed by law for certifying to the debtor of a deceaſed perſon who are the creditor's next of kin, or rather that he himſelf is in ſafety to pay to thoſe who claim the debt in that character, it is abundantly natural, that if he chuſes to reſort to this ſecurity, the law ſhould not deny it to him; and it is for the ſame reaſon that the ſtatute of 1693 above quoted, does not oblige the parties intereſted to diſpenſe with the production of confirmed teſtaments. The diſtinction ſtated between the legitim or the relict's ſhare, and the dead's part, truly favours the right of the next of kin. The firſt mentioned intereſts proceed not at all from ſucceſſion, being in their very nature ſeparated and divided from the dead's part. As, therefore, the next of kin of the deceaſed have no connection with them, if they were not *ipſo jure* tranſmiſſible to the heirs of thoſe to whom they belonged, but who have not appropriated them, they would of neceſſity be rendered caduciary. In fact, however, poſſeſſion could ſcarcely be wanting in thoſe caſes, on the part either of the widow or of the children; of the former at leaſt in the ſtricteſt ſenſe.

The Court were unanimouſly of opinion, that poſſeſſion by the next of kin can have no effect in conferring an active title farther than with reſpect to the ſubjects actually poſſeſſed. Accordingly,

The Lords preferred Walter Macdowall to the fund *in medio*.

Reporter, *Lord Alva*. For the heir of the diſponee, *Elphinſton*. Alt. *Currie*.
Clerk, *Orme*.

S.

N° CLXV.

N° CLXV. *June* 29. 1784.

Major STEPHEN BROMFIELD,

AGAINST

Mrs ANNE PATERSON.

TAILZIE. *Whether a deed of entail, being a continuation of a prior one inſerted in the regiſter of tailzies, ought likewiſe to be recorded.*

Whether it is ſufficient that the reſtrictive clauſes of ſuch a deed be engroſſed in the inſtruments of ſeiſin and reſignation.

IN 1743, Sir John Paterſon of Eccles, executed an entail of his eſtate in favour of his grandſon, with the uſual prohibitive, irritant, and reſolutive clauſes, under the reſerved power of revoking or altering it at his pleaſure. This entail was completed by infeftment, and was recorded in the regiſter of tailzies.

Afterwards, by another writing, he made a formal renunciation of the power of revocation. This deed, which was merely perſonal, was recorded in the above-mentioned regiſter only.

In 1758, a new deed was executed by Sir John, with the conſent of his grandſon, the inſtitute in the former entail, containing a diſpoſition of the lands, differing materially from that ſettlement in reſpect of deſtination, and other circumſtances. Inſtead of repeating in this the reſtraints of the foregoing deed, the following reference was made: "With and under the proviſions, conditions, irritant and "reſolutive clauſes, as contained in the original bond of tailzie, and "in the charter and infeftment following thereon." This deed was not recorded in the regiſter of tailzies.

The entailer having died, he was ſucceeded by the inſtitute, who was the late Sir John Paterſon. By him the procuratory contained in the laſt-mentioned ſettlement was executed; and in the inſtruments both of reſignation and of ſeiſin which followed, all the prohibitive and irritant clauſes of the former entail were ſpecially engroſſed.

On the death of the late Sir John Paterſon, his daughter, Mrs Anne Paterſon, made up titles as his heireſs; when Major Bromfield, a creditor of his to a large amount, brought an action againſt her, as liable for her father's debts, notwithſtanding the above ſettlements.

Pleaded for the purſuer: By the ſettlement executed in 1758, which was the only title of the late Sir John Paterſon, the predeceſſor of the defender, and which is to be conſidered as in itſelf a proper entail, an end was put to the prior one of 1743. But not having been recorded, it has no ſanction from the ſtatute of 1685, which preſcribes regiſtration as a circumſtance eſſential to the validity of entails.

There

There is yet another objection to this ſettlement, though viewed not as a tailzie *per ſe*, but as a conveyance ſubſequent to another entail; becauſe it contains no ſpecial recital of the clauſes prohibitive, irritant, and reſolutive, but only a general reference to them, as engroſſed in an anterior deed; Viſcount of Garnock *contra* Maſter of Garnock and others, 28th July 1725, Lord Kames; Murray Kinninmound *contra* Murray, 5th July 1744, Clerk Home. Nor is this defect ſupplied by the inſertion of thoſe clauſes in the inſtruments of reſignation and of ſeiſin; for the act of Parliament requires, that they ſhould be repeated in all the rights and conveyances of a tailzied eſtate.

Anſwered: The diſpoſition of 1758 ought to be conſidered, not as a new entail, but as a continuation of the prior ſettlement effected in 1743. Indeed, by the renunciation executed by Sir John the elder in 1755, he precluded himſelf from the power of revoking or altering that original entail. There was, therefore, no occaſion to regiſter in the record of tailzies, the deed of 1758.

Nor, ſince in the laſt-mentioned diſpoſition a reference was made to the reſtraining clauſes of the entail, is it of importance that a more ſpecial inſertion of them has been omitted. The deciſions quoted on the other ſide, reſpected caſes in which it had been neglected to repeat the reſtrictions in the inſtruments of ſeiſin; whereas, here they are fully engroſſed in the inſtruments both of reſignation and ſeiſin. The following one affords a precedent more ſuitable to the preſent caſe; 24th July 1764, Laurie *contra* Spalding, Fac. Coll.

Replied: The renunciation executed in 1755, was merely a perſonal deed, nor was it recorded in the regiſter of ſeiſins and reverſions; and for that reaſon, could not qualify the real right created by the tailzie of 1743, or produce any effect againſt onerous creditors.

The Lord Ordinary reported the cauſe; when

The Lords found, "That the diſpoſition 1758, differing in ſeveral "particulars from the entail 1743, and being followed with charter "and infeftment, is to be held a new ſettlement of the eſtate; and "not having been recorded in the regiſter of entails, is not an ef-"fectual entail:" And found, "That in reſpect the limitations in the "entail 1743 are not particularly inſerted in the ſaid diſpoſition, "1758, the ſame is not effectual againſt creditors."

To this judgment the Lords adhered, on adviſing a reclaiming petition and anſwers.

Reporter, *Lord Eſkgrove.* Act. *Rolland, Blair.* Alt. *Abercromby.*
Clerk, *Home.*

S.

N° CLXVI.

N° CLXVI. *July* 6. 1784.

JAMES STEWART,

AGAINST

DUNCAN MACDONALD, HUGH CHISHOLM, and GEORGE BEAN.

REPARATION. *A creditor not responsible for the misconduct of an agent or messenger in the execution of diligence.*

JAMES STEWART, being apprehended by Hugh Chisholm, a messenger, for a debt due to Duncan Macdonald, consigned the money in the hands of the magistrate, to whom he was presented for incarceration, and was set at liberty. A few hours after, he was again apprehended, on the former diligence, by Hugh Chisholm, in consequence of directions from George Bean, the agent for Mr Macdonald, the creditor, and thrown into prison, where he lay for several days.

In an action of damages founded on these proceedings, the Lords pronounced the following interlocutor:

"Find, that the imprisonment after consignation was illegal and "oppressive, and that George Bean the agent, and Hugh Chisholm "the messenger, are conjunctly and severally liable in damages and "expences; but in respect there is no evidence that the defender "Duncan Macdonald was in any degree accessory to the imprison-"ment of the pursuer, therefore assoilzie him from the process."

Lord Ordinary, *Braxfield.* Act. Solicitor-General *Dundas, W. Miller.* For the Creditor, Lord-Advocate *Campbell, G. Buchan-Hepburn.* For the Agent and Messenger, *Mackintosh, H. Erskine, Honyman.* Clerk, *Home.*

C.

N° CLXVII. *July* 6. 1784.

ARCHIBALD MALCOLM,

AGAINST

ANNE MACCORNOCK, and others.

RIGHT IN SECURITY. *A Creditor* in diem, *whoſe debt is ſecured on an heritable ſubject not equivalent to its amount, is entitled to ſupply the deficiency, by attaching the produce accruing prior to the term of payment.*

HUGH MACCORNOCK granted, in favour of his daughter Anne, and of his other children, an heritable bond of proviſion for L. 600, payable at the time of his death, and containing an aſſignation to the mails and duties of the lands, which was to commence at that period.

He afterwards granted to Malcolm likewiſe, from whom he borrowed a ſum of money, an heritable bond, with an aſſignment to the mails and duties in common form, and payable at an enſuing term.

Maccornock having become bankrupt, his lands were ſold by judicial ſale; but the price being chiefly applied for the payment of other debts preferable to theſe, there remained for the payment of them both but the ſum of L. 163.

Though the childrens proviſions were preferable to Malcolm's claim, yet not being payable till the death of their father, who was ſtill alive, whilſt Malcolm's debt was immediately exigible, a competition aroſe for the intereſt of the above balance, accruing during the father's lifetime.

Pleaded for Malcolm: The children of Maccornock have no right to receive one penny of the ſums provided for them until their father's death; whereas the competitor's debt is already due. Their real ſecurity indeed is prior to his; but as it can have no effect beyond the obligation in their favour, ſo if at the time of payment it ſhall eſtabliſh their preference, it will have had its full operation. Beſides, it is to him, and not to them, that an aſſignation *de præſenti* of the mails and duties of the lands impignorated was made. To thoſe rents, therefore, during the lifetime of the father, if the ſubjects had not been judicially ſold, he only would have had acceſs; and his right to the intermediate intereſts of the price, which has become a *ſurrogatum* for the lands, muſt be equally excluſive.

Anſwered: Nothing more is here required, than that the real right granted for the ſecurity of the childrens proviſions ſhould have that effect, as far as the reſidue of the ſubject impignorated, or rather of its

prieç,

price, will extend. No doubt, until their father's death, they are not to receive payment; or, in other words, the intervening intereſts of the ſum provided do not belong to them, and they claim them not. But is that a reaſon why the ſecurity given for the payment of the ſtock itſelf ſhould be loſt in whole or in part? Lyon *contra* Creditors of Eaſter Ogle, 24th January 1724, Edgar. Such however is the oppoſite argument. The balance of the price not being equal to one third of the childrens debt, can never become effectual for their payment, if not by the progreſſive accumulation of the intermediate annualrents. Were this not to be permitted, how could it be ſaid that the payment of their proviſions had been ſecured to the extent of the impignorated ſubject? As to the aſſignation to mails and duties, the preſent claim is independent of that right.

The Lord Ordinary took this queſtion to report.

The interlocutor of the Court was the following: "Upon the report of the Lord Probationer, now Lord Rockville, and having adviſed the memorials for the parties, the Lords found, That the children of Hugh Maccornock are preferable to Archibald Malcolm upon the balance of the price *in medio*, and intereſt thereof due and to become due."

A petition for Malcolm, reclaiming againſt this judgment, was refuſed without anſwers.

Lord Ordinary, *Weſthall.* Clerk, *Orme.* For Malcolm, *Wight, Corbet.* Alt. *Dalzell.*

S.

N° CLXVIII. *July* 7. 1784.

The CREDITORS of Provoſt AYTON,

AGAINST

MARGARET AYTON.

PASSIVE TITLE. *General ſervice as heir of line, an univerſal paſſive title till ſet aſide by reduction.*

PROVOST AYTON having been veſted in an eſtate, in truſt for Mr Colvill, Margaret Ayton, his daughter, agreed, after his death, to grant a reconveyance.

As Provoſt Ayton had executed a general diſpoſition in favour of his daughter, ſhe might have fulfilled her agreement, without the intervention of a ſervice, or incurring an unlimited repreſentation; but the

the doer of Mr Colvill, at whoſe expence the buſineſs was carried on, being ignorant of that circumſtance, *expede* a general ſervice in her behalf, as heir to her father, after which ſhe rediſponed the eſtate to Mr Colvill.

Some time afterwards ſhe was purſued by the Creditors of Provoſt Ayton, on the ground of the ſervice juſt now mentioned.

The Lord Ordinary aſſoilzied, "in reſpect there was ſufficient evi- "dence that the general ſervice was not taken in order to veſt any "right of ſucceſſion, but merely for the purpoſe of renouncing a "truſt, and that the purſuer declined any proof of actual intro- "miſſion."

The purſuer reclaimed; when it was

Obſerved on the Bench: To admit the circumſtances ſtated in the Lord Ordinary's interlocutor as a defence, by way of exception, againſt the known legal conſequences of a general ſervice, would be a dangerous innovation. Here however there is ſufficient ground to relieve the defender, by ſetting aſide the ſervice altogether, in a proper action brought for that purpoſe.

The Lords remitted the cauſe to the Lord Ordinary, in order that a reduction of the ſervice might be brought by the defender.

Lord Ordinary, *Gardenſton.* Act. *Wight.* Alt *Maconochie.* Clerk, *Robertſon.*

C.

N° CLXIX. *July* 20. 1784.

ANDREW BROWN Petitioner.

EXPENCES.—*Coſts awarded in the Houſe of Peers.*

BY a judgment of the Houſe of Peers, John Shortreid was permitted to withdraw an appeal entered by him, againſt certain interlocutors of the Court of Seſſion, upon payment of L. 30 Sterling, in name of coſts.

Upon this, Andrew Brown, who was the reſpondent, applied by petition to the Court of Seſſion, for a decreet authoriſing him to levy the above mentioned ſum.

Obſerved on the Bench: Where coſts are awarded by the Houſe of Lords,

Lords, upon a final diſcuſſion of the matters brought before them, the authority of the Court of Seſſion muſt of neceſſity be interpoſed, to render the judgment effectual, becauſe the Court of review has no longer any juriſdiction. But in caſes like the preſent, no ſuch interference is neceſſary. Till the L. 30 is paid, the cauſe is ſtill in dependence in the Houſe of Lords, and upon the appellant's refuſing to pay, the reſpondent may inſiſt for a determination of the appeal, and obtain full coſts.

The Lords refuſed the petition without anſwers.

For the Petitioner, *George Currie.*

C.

N° CLXX. *July* 20. 1784.

JAMES BUCHANAN and JOHN AULD,

AGAINST

ADAM GRANT.

SERVICE AND CONFIRMATION. *Payments to the creditors of a perſon deceaſed, in conſequence of a general mandate from the neareſt in kin, or general diſponee unconfirmed, effectual in a queſtion with the creditors of the defunct confirming.*

A Trading Company, of which Adam Grant was the managing partner, being indebted to William Galdie deceaſed, in the ſum of L. 1219 Sterling; George Galdie, the neareſt in kin, and general diſponee, authoriſed Mr Grant, out of that fund, to pay his predeceſſor's moſt preſſing debts.

Within two years after the death of William Galdie, Mr Grant accordingly diſburſed the ſum of L. 1091. Being then ſued by James Buchanan and John Auld, as executors-creditors of William Galdie, for a much larger ſum than remained in his hands, the Lord Ordinary found, "That the ſum of L. 1219 Sterling, acknowledged to be "due to William Galdie at the time of his death, was *in hæreditate* "*jacente* of him, and could not be diminiſhed by the payments made "by the defender in conſequence of a general order from George "Galdie, the neareſt in kin, or general diſponee to the defunct; "ſeeing the ſaid George Galdie had made up no legal title in his "perſon, either by confirmation, or by obtaining decreet againſt the "defender."

In ſupport of this judgment, which was brought under the review of the Court,

The purſuers *pleaded:* The modern practice, in order to facilitate the tranſmiſſion of moveable property by ſucceſſion, has diſpenſed with confirmation, either where poſſeſſion of the effects has been apprehended by thoſe entitled to the executry, or where, with regard to *nomina debitorum*, which are incapable of actual poſſeſſion, the ſucceſſor, by obtaining payment, or a corroborative obligation in his own favour, has been ſubſtituted in the place of the deceaſed. But the ſecurity of creditors, the primary and eſſential object of confirmation, is ſtill unimpaired. A payment by a debtor of a perſon deceaſed, though an effectual bar to every claim by the ſucceeding neareſt in kin, will afford no defence againſt a creditor of the deceaſed confirming. Hence a debtor in no caſe can be compelled to pay without a confirmation of the whole debt; a regulation ſurely altogether unreaſonable, if the diſcharge by the neareſt in kin were a complete extinction of his obligation.

Nor, though payments to the neareſt in kin were effectual even againſt the creditors of the predeceſſor, would it follow that ſuch as are made to the creditors of the deceaſed, by virtue of a general order from the neareſt in kin, ſhould be attended with the ſame conſequences. In the former, the act of receiving payment, like the poſſeſſion of *corpora mobilia*, may be conſidered as a complete transference of the property or right, while, by means of the univerſal repreſentation thereby incurred, the creditors of the predeceſſor acquire an additional ſecurity. But a general direction to pay the predeceſſor's debts from the proceeds of his own eſtate, cannot be viewed as an appropriation on the part of the neareſt in kin. And as it can as little be thought to indicate his intention to incur a paſſive title, the funds may in this manner be withdrawn from the other creditors of the deceaſed, without the poſſibility of redreſs. It is likewiſe material, that no decreets were here obtained, either by the neareſt in kin, or by the creditors to whom the payments were made. If that authority is requiſite to an executor confirmed, both for liquidating the debt, and as a notification to other creditors, a pro-executor, or the mandatary of the neareſt in kin unconfirmed, cannot ſurely be in a better ſituation.

Anſwered for the defender: It is now a fixed point, that poſſeſſion of moveables, or the receipt of ſums due to the predeceſſor, is ſufficient, without confirmation, completely to veſt the right in the neareſt in kin, or general diſponee, Dict. *voc.* Service and Confirmation. No rule, however, could be more unjuſt, if limited to the intereſt of thoſe entitled to the ſucceſſion, while the effects thus transferred to them were ſtill ſubject to the creditors of the deceaſed, as if no intromiſſion had taken place. The inevitable conſequence would be, that a debtor to an opulent eſtate might be compelled, at the diſtance of forty years, to pay a ſecond time to thoſe who, during that interval, had truſted to the credit of the neareſt in kin or their repreſentatives.

That a debtor cannot be compelled to pay to an executor unconfirmed, proceeds on principles altogether different. The perſon ſuppoſed to be dead may be ſtill alive; his moveable ſucceſſion may devolve not to one only, but to a variety of perſons in the ſame degree

gree of propinquity; or thoſe entitled to it may have been excluded by general diſpoſitions, teſtaments, ſpecial aſſignations, or legacies. Even the character of general diſponee, though more readily diſcernible than that of the legal ſucceſſor, is yet ſubject to recal, or may be limited by poſterior ſettlements. A debtor, therefore, is permitted to require confirmation, not for conferring a right, but for authenticating that already eſtabliſhed. He is not, however, prevented from paying to the neareſt in kin or general diſponee unconfirmed; and a payment to a third party, in conſequence of an order from them, muſt be equally effectual.

Nor was a decreet at all neceſſary againſt the defender. An executor, whoſe intention is not to incur an unlimited repreſentation, is merely a truſtee for thoſe intereſted in the moveable eſtate, and ought not to pay without the warrant of a decreet. From neglecting that precaution, there cannot be a doubt that George Galdie has become liable to the purſuers, as if the ſums paid by his order to the other creditors were ſtill *in medio*, 20th July 1780, Urſula and Jean Smith *contra* James Marſhall. But the payments, in every other reſpect, are unqueſtionably valid. Nor have the purſuers the ſmalleſt ground of complaint, ſince it was in their power, in terms of the act of ſederunt 1662, and the ſtatute 1695, to prevent every intromiſſion which they conceived to be prejudicial to their ſecurity.

The Lords did not diſtinguiſh payments by order of a neareſt in kin or general diſponee unconfirmed, from thoſe made directly to himſelf; both being deemed equally effectual to tranſmit the right in ſucceſſion, and to operate a complete extinction of the debt. It was farther obſerved, that the general order inferred a paſſive title, to the extent at leaſt of the ſums the purſuers might have drawn if the payments had not been made: Alſo, that the purſuers might ſtill challenge the payments made to the other creditors, ſo far as an undue or partial preference was intended.

The Lords found, "That in reſpect Adam Grant, the defender, "paid the money in queſtion to the different creditors of the deceaſed "William Galdie, by order of George Galdie, the neareſt in kin and "general diſponee of the ſaid William Galdie, he cannot now be "found liable to pay the money over again to the purſuers as execu-"tors-creditors to the ſaid William Galdie; and remit the proceſs "to the Lord Ordinary to hear the purſuers on their particular ob-"jections to thoſe payments."

Lord Ordinary, *Gardenſton*. Act. *Blair*, *Mat. Roſs*. Alt. Lord-Advocate *Campbell*, Solicitor-General *Dundas*, *Mackintoſh*, *Rolland*. Clerk, *Menzies*.

C.

N° CLXXI.

N° CLXXI. *July* 21. 1784.

Sir JAMES GRANT,

AGAINST

The CREDITORS of the YORK-BUILDINGS COMPANY.

PRESCRIPTION—*of a debt due by a corporation, interrupted by a horning uſed againſt ſome of the members, who had been the repreſentatives of the corporation when the decreet on which the horning proceeded was pronounced.*

THE York-buildings Company was debtor by bond to the predeceſſor of Sir James Grant, who brought an action in the year 1735, calling by name the then Governor and ſix Aſſiſtants of the Company, *for themſelves*, and as repreſenting the Company. And upon the decreet which followed, a horning was executed in the month of July 1740.

In the ranking of the creditors of the Company, Sir James Grant, in the month of March 1780, entered a claim, in virtue of the abovementioned debt and diligence. The other creditors objected the negative preſcription, and

Pleaded: Corporations which are eſtabliſhed by law, can ſue or be ued only by the particular name or deſignation given to them by the legiſlature. The action, therefore, inſtituted in the year 1735, not being directed againſt the Company, but its managers for the time, was altogether irregular and inept; and the horning iſſued in the year 1740, was ſtill more exceptionable, the perſons againſt whom it was executed being no longer the repreſentatives of the Company. They were not even liable, as partners, for its debts, it being only the ſtock belonging to corporations of this ſort, and not the wealth or ſecurity of particular members, on which creditors can rely for their payment.

Anſwered: The authority given by Parliament to ſue a chartered Company by its corporate firm, cannot detract from the validity of judicial proceedings, in which, without uſing that privilege, its repreſentatives have been regularly cited. The decreet obtained by the claimant was therefore completely effectual; as was alſo the ſubſequent horning, which, without a total nullity, could not have been framed in any other terms. The irregularity, however, of the diligence here uſed as an immediate document againſt the Company, will not ſupport the preſent objection. The defenders in the action 1735 were called, not only as repreſenting the Company, but as individuals, in which laſt character they were liable, after the expiry of their office, in the ſame manner as magiſtrates, for the debts of

of a burgh contracted during their adminiſtration; Kilkerran, 10th July 1752, Cleland *contra* the Magiſtrates of Pittenweem. In virtue of the horning which followed, their perſons might have been ſeized by caption, or an eſcheat of their moveables might have taken place. As therefore diligence uſed againſt one of many co-obligants will preſerve the debt againſt the whole, the ſtatutory exception is here altogether precluded.

The Lords conſidered the decreet of conſtitution as ſufficiently formal. Their only difficulty reſpected the effect to be given to the horning which could not be received as an immediate document againſt the Company. A conſiderable majority, however, were of opinion, that the intimation thereby afforded to one or more of the partners was effectual to ſave the debt from preſcription.

The Lords found, "That the decreet of conſtitution, with the "horning and execution following thereon, ſufficiently interrupt the "negative preſcription."

Lord Reporter, *Monboddo.* For Sir James Grant, Lord Advocate *Campbell, James Grant.* For the other Creditors, *Elphinſton, Blair, Abercrombie.* Clerk, *Colquhoun.*

C.

N° CLXXII. *July* 21. 1784.

The Earl of HOPETOUN,

AGAINST

The CREDITORS of the YORK-BUILDINGS COMPANY.

PRESCRIPTION. INTERRUPTION—*by informal diligence.*

IN the ranking of the Creditors of the York-buildings Company, a claim was entered, in the year 1779, by the Earl of Hopetoun, in virtue of a contract which had been executed, in the year 1731, between his father, the late Earl, on the one part, and Colonel Horſey, as commiſſioner for the York-buildings Company, on the other.

To this claim the Creditors of the Company objected the negative preſcription of forty years, the only document taken on it having been a horning executed in the year 1743, not againſt Colonel Horſey, but againſt the managers of the Company.

Pleaded for the Earl: Though Colonel Horſey was the nominal party, the contract bound the York-buildings Company, and them

only. The omiſſion, therefore, to take a decreet of conſtitution againſt them, as the warrant of the horning which followed, being merely an inaccuracy in point of form, will, in a queſtion of this ſort, be altogether diſregarded; Dictionary, *voce* Preſcription.

Anſwered: There is a ſolid diſtinction between the informal execution of regular diligence, which has been admitted as a ſufficient intimation of the claimant's intention to proſecute, and the uſing of diligence intrinſically inept and void, to which no effect can be given; Erſkine, b. 3. tit. 7. § 40.; Kilkerran, *voce* Preſcription, p. 414. Of the latter ſort was the horning in queſtion. To Colonel Horſey, the proper and only debtor in the obligation, it could afford no notice, becauſe it was not executed againſt him; and it was equally ineffectual againſt the Company, who were no parties to the contract, on which alone it could proceed.

The Lords admitted the diſtinction, and found, "That the horning executed in the year 1743 againſt the Governor and Aſſiſtants to the Court of Directors of the York-buildings Company, was an inept diligence, and did not interrupt the negative preſcription."

Lord Reporter, *Monboddo.* For the Earl of Hopetoun, Solicitor-General *Dundas.*
For the other Creditors, *Elphinſton.* Clerk, *Colquhoun.*

C.

N° CLXXIII. *July* 28. 1784.

ELISABETH CHALMERS,

AGAINST

HELEN DOUGLAS.

PROOF.—*How far, in an action of defamation, ſuch queſtions may be put to witneſſes, as have not an immediate relation to the conduct of the parties.*

HELEN DOUGLAS, being purſued in an action of defamation and damages, before the commiſſaries, by Elizabeth Chalmers, alleged compenſation on account of certain printed writings of an injurious tendency, aſcribed by her to the purſuer; and was allowed to prove, "that the purſuer was the author or publiſher of the "writings, and that ſhe ſent the ſame to the defender; or that ſhe "directed, aided, or abetted therein."

The queſtions propoſed to the witneſſes by the defender were, "Whether they knew or ſuſpected who was the author or printer of "the writings in queſtion, or who paid the expence of printing "them;

" them; or any perſon or perſons concerned in writing, printing, cir-
" culating, or diſtributing them; and if they did, to condeſcend on
" the name of ſuch perſon or perſons?"

The commiſſaries rejected theſe interrogatories as incompetent; and in ſupport of that judgment, which was brought under review of the Court of Seſſion, the purſuer

Pleaded: The defence of recrimination could only have ariſen from the purſuer's acceſſion to the injury here complained of. It is therefore her conduct alone, or that of perſons over whom ſhe may be ſuppoſed to have influence, which can be made the ſubject of the preſent inveſtigation. It is true, that in criminal judicatories, which are eſtabliſhed for the trial of offences of a public nature, an enquiry has been permitted, in the form of precognition, without a reference to any individual. But ſuch a proceeding is altogether unprecedented in courts of civil juriſdiction, which can enquire into the rights of thoſe only who are regularly brought before them. In this inſtance it would be manifeſtly unjuſt, the defender being thereby allowed to with-hold the indemnification due by her, until the claims which ſhe chuſes to rear up againſt third parties are brought to a concluſion.

Anſwered: It cannot be imagined, that the purſuer would herſelf carry the writings to the printer, or tranſmit them to the defender, or even would employ in that buſineſs thoſe who are immediately connected with her. The proof, therefore, muſt neceſſarily be of an indirect nature, aſcertaining at firſt the actual publiſhers or ſenders, and thence proceeding, by a gradual inveſtigation, to the perſons by whom they were employed. Nor could the purſuer reaſonably complain, though its effect were to eſtabliſh the offence againſt a third party, which, without any prejudice to her, would enable the defender to obtain a proper reparation.

The Lord Ordinary found, " in regard the injury complained of
" conſiſts in the purſuer's agency, mediately or immediately, writing,
" printing, or publiſhing the writings, and ſending the ſame to the
" defender, it may be fair to examine the witneſſes on ſuch agency
" in general, or concerning the interpoſition of particular perſons,
" where there is any preſumption that ſuch interpoſition can be im-
" puted to the purſuer; but finds, that the mode of interrogating
" witneſſes, avowed on the part of the defender, and actually com-
" menced, is irregular and improper, and ought not to be admitted."

Upon adviſing a reclaiming petition for the defender, with anſwers for the purſuer, the Court altered the Lord Ordinary's interlocutor, and repelled the objections to the interrogatories put to the witneſſes.

Lord Ordinary, *Swinton.* Act. Lord Advocate *Campbell,* Solicitor-General *Dundas.*
Alt. *Maclaurin, H. Erſkine, Buchan-Hepburn, Cullen.* Clerk, *Orme.*

C.

N° CLXXIV.

N° CLXXIV. *Auguſt* 4. 1784.

Mrs JACINTHA DALRYMPLE,

AGAINST

JOHN MURRAY and others.

TRUST. DILIGENCE,—*preſtable by truſtees in a family-ſettlement.*

MR ROBERT DALRYMPLE, by a deed of truſt, conferred on Mr Murray and others of his friends, the whole management and adminiſtration of his eſtate after his death. The declared purpoſes of this truſt were, that the truſtees ſhould firſt of all diſcharge his debts, which were very inconſiderable, and pay his legacies, one of which was deviſed to Mrs Jacintha Dalrymple, his grand-daughter, and then make over the reſidue of his effects to Hugh Dalrymple, his grandſon.

The truſt-deed contained the following clauſe: "Declaring, That "the truſtees ſhall not be liable for omiſſions, nor *in ſolidum* one for "another, but each ſhall be liable and accountable for his own ac- "tual intromiſſions only; nor ſhall they be liable for any factor or "caſhier to be appointed or employed by them, further than that he "is habite and repute ſufficient and reſponſible for the time; being "ſatisfied that my ſaid truſtees will act herein as if they were acting "for themſelves."

The factor whom the truſtees firſt appointed was one of their own number; a man in good credit at the time, but who afterwards became inſolvent. Inſtead of complying with the direction of the truſt-deed, by diſcharging the debts and legacies in the firſt place, he began with paying large ſums to the reſiduary legatee. The truſtees diſpoſſeſſed him of the office, and named in his room a perſon not of their number. But he, too, made ample payments to the reſiduary legatee, inſomuch that there remained not ſufficient funds for the ſatisfaction of the other legatees and the creditors.

Mrs Jacintha Dalrymple therefore inſtituted an action againſt the whole truſtees, as being perſonally liable to her in payment of her legacy; when, in defence, it was

Pleaded: The miſmanagement of the factors aroſe not from any fault in the truſtees. They nominated to that office perſons who at the time were poſſeſſed of credit and character; nor were they bound, either by the nature of their duty, or by the terms of the truſt-deed, to watch every ſtep in the conduct of their factors with a jealous eye. If any blameable negligence has occurred, it is on the ſide of the legatee, who was not reſtrained by a truſt-ſettlement of this kind, as ſhe might have been

been by a deed framed for behoof of creditors, from obtaining payment as ſoon as it became due.

Anſwered: The acceptance of this truſt implied an obligation on the truſtees to act in ſuch a manner with reſpect to the affairs of their deceaſed friend, as they would do in their own concerns. But to theſe, it is not to be preſumed that they would have ſhewn ſuch a degree of inattention.

The Lord Ordinary " aſſoilzied the truſtees;" and

" The Lords having adviſed the petition for Mrs Jacintha Dal-
" rymple, reclaiming againſt the above judgement, with anſwers for
" the truſtees, and having heard parties procurators thereon, and
" upon the whole cauſe, found no ſufficient ground, from the terms
" of the truſt-right, or from the manner in which the truſt has been
" executed, to ſubject the truſtees perſonally to the payment of the
" ſums purſued for."

The Court adhered to this interlocutor, on adviſing a reclaiming petition and anſwers.

Lord Ordinary, *Braxfield.* Act. *Maclaurin, H. Erſkine.* Alt. *Lord Advocate, G. Ferguſſon.*
Clerk, *Home.*

S.

DECISIONS

OF THE

COURT OF SESSION.

N° CLXXV. *November* 18. 1784.

RICHARD CAMERON, and others,

AGAINST

JOHN ROBERTSON, and others.

PROVISION TO HEIRS AND CHILDREN.—SERVICE AND CONFIRMATION.—*A proviſion by a father, payable at his death, together with a diſpoſition in ſecurity of it, having been granted in favour of his children* naſcituri; *whether the titles can be properly eſtabliſhed by ſervice.*

JOHN CAMERON, by contract of marriage, provided to his children *naſcituris*, the ſum of 55,000 merks, "to be diſtributed "amongſt them in ſuch proportions as he, *while in life*, ſhould "be pleaſed to appoint;" and in ſecurity of that proviſion, he "diſponed and made over (directly) to them, whom failing, to "himſelf, and his neareſt heirs and aſſignees," certain lands and other heritable ſubjects. A procuratory of reſignation in the ſame terms, but not a precept of ſeiſin, was ſubjoined.

The children of this marriage were eleven in number; to all of whom, except the eldeſt ſon, Mr Cameron granted bonds of proviſion for ſums exceeding the amount of thoſe formerly deſtined. To the eldeſt ſon he conveyed his eſtate; and, in the diſpoſition, expreſsly burdened him * with the payment of theſe proviſions. This ſon, who, at the time of his father's death, was in opulent circumſtances, ha-

* *Vid.* Faculty Collection, 19th July 1780.

ving afterwards ſuffered great loſſes in trade, became bankrupt. Adjudications were deduced againſt his lands; but before any of his creditors had completed that diligence by infeftment, the children who, under the contract of marriage, had been ſerved heirs of proviſion to their father, and on that title had executed the procuratory of reſignation, were infeft in the ſubjects diſponed to them in ſecurity.

By virtue of this prior infeftment, the children claimed a preference before the other creditors of Richard their brother. Theſe creditors objected to the validity of that right; and

Pleaded. The contract of marriage ought to be conſidered as containing an obligation to provide the children, rather than as forming an actual ſettlement or proviſion in their favour. They were thus their father's creditors, and the debt which he owed was that of ſecuring to them the ſpecified ſhare in his ſucceſſion. It was a conditional debt indeed; the condition of his leaving a ſufficient extent of funds beyond the onerous debts that his power of adminiſtration enabled him to contract, being implied. But ſince they were creditors, and not heirs, the *ſervice* of the children was totally inept. Dict. of Deciſ. vol. 2. p. 280. 3d February 1732, Campbell *contra* Duncan; Kilkerran, 16th November 1747, Anderſon *contra* Shiells; Fac. Coll. Moncreiffe *contra* Moncreiffe, 8th December 1759; Porterfield *contra* Gray, 9th December 1760. At the ſame time, it is no doubt equally clear, on the other hand, that if the father had afterwards effectuated the ſettlement, the children would have become heirs, and of courſe ceaſed to be creditors, his debt, in this manner, being extinguiſhed. That, however, was not the caſe.

But let the contract be viewed even as a preſent conveyance to the children *naſcituris*, and their *ſervice* will appear equally inhabile. The diſpoſition and the procuratory are conceived directly and immediately in their favour; and, conſequently, veſt them with the right of diſponees or creditors, and not of heirs. It is to aſcertain this laſt character that a ſervice is employed, and by no means to prove the identity of a perſon claiming as a diſponee; though, in ſome ancient deciſions, this point ſeems to have been differently underſtood. One might deſtine an eſtate to the heirs *naſcituris* of a ſtranger; but ſurely a ſervice would then appear an inhabile mode of effectuating the conveyance; and it muſt, in the preſent inſtance, be equally improper. The legal and requiſite methods are thoſe of adjudication as creditor, of adjudication in implement, or of proceſs of declarator.

Another objection, entirely diſtinct from the former, is, that the father, by the obligation laid on his eldeſt ſon to pay even larger proviſions to the other children than thoſe of the contract were, actually diſcharged the debt which he had thereby come under. He thus gave to them the credit of a reſponſible man, from whom they might eaſily have operated payment, and to it therefore this credit was equivalent.

Anſwered: It is only when their proviſions are payable during their father's lifetime that children are to be underſtood to have a *jus crediti* againſt

againſt him. If payment is not due till after his death, they then take their proviſions as ſucceſſors or repreſentatives ſubject to his debts or deeds.

That point however is perhaps little material to the preſent queſtion. By the diſpoſition in ſecurity to the children *naſcituris*, the *jus crediti* was completed into an actual ſettlement of ſucceſſion. For ſuch it was, and not an immediate transference of property, although nether fee nor liferent were expreſsly *conceived* to the father; this reſervation being in practice underſtood in ſuch caſes as implied when not explicitly declared.

Even in the character of diſponees, the right of the children would be equally good. They are in fact the very perſons to whom the procuratory was granted; and if that certification be neceſſary, they have been declared to be ſuch by the regular and ſolemn form of ſervice, the authority of which is not inferior to that of any declarator. To this ſecurity, which could not be diminiſhed by the father's ſubſtituting for it the perſonal obligation of his ſon, the other children are ſtill entitled to recur.

The cauſe was reported by the Lord Ordinary, when

The opinion of the Court in general was, That there were not *termini habiles* for the *ſervice* of the children; but ſome of the Judges thought that there were ſuch, and reſted their judgment on the father's having implemented his obligation, by conſtituting the other children creditors to his eldeſt ſon.

"The Court repelled the claim of the children of John Cameron." And to this judgment they adhered, after adviſing a reclaiming petition, with anſwers.

Reporter, *Lord Monboddo.* For the Children, *Cullen, H. Erſkine.*
Alt. *Lord Advocate, W. Craig.* Clerk, *Home.*

S.

N° CLXXVI. *November* 19. 1784.

JOHN ROSS,

AGAINST

ALEXANDER SHAW.

PRESCRIPTION—*The triennial preſcription of an account, not obviated by a written commiſſion for the goods, joined to a judicial acknowledgement of the furniſhing.*

ROss having purſued Shaw for payment of an account of goods furniſhed *twelve* years before, produced, in order to obviate the plea of the *triennial* preſcription enacted by the ſtatute of 1579, c. 83. certain

certain letters of the defender's, commiſſioning the goods. The defender admitted the furniſhing, but aſſerted that payment had been made; and

Pleaded: An order for merchandiſe, given in writing, can never be conſtrued into a *written obligation* in the terms of this ſtatute; ſince it affords no proof of the goods being actually furniſhed, or, in other words, that any debt has been created. The preſent caſe then comes not within the exception of the ſtatute; and as that enactment is founded on the preſumption of payment, the acknowledgement of furniſhing alone is of no conſequence.

Anſwered: The act of parliament in queſtion contains an expreſs declaration, that it extends not to debts founded on written obligations; from which it is probable, that its object is the proof of conſtitution of debt; the plain language of the whole enactment being, that the accuracy of teſtimony in ſuch matters is not to be confided in after three years from their date ſhall have elapſed. Hence the common idea of this ſtatute's having eſtabliſhed, on the expiration of that period, a preſumption of payment which is not to be elided except *ſcripto vel juramento*, ſeems to be contradicted by its terms; the preſumtion thus introduced being truly againſt the conſtitution of debt, if not otherwiſe aſcertained than by parole evidence. In the preſent caſe, however, the letters muſt remove the hazard ariſing from the lubricity of teſtimony, ſo as to render it admiſſible; according to Lord Stair, 5th July 1681, Dikſon *contra* Macaulay. But in fact, the defender, by acknowledging the furniſhing conſequent on the written commiſſion, has given to it the ſame effect as if at the time he had added in writing a declaration of the ſame import.

The Lord Ordinary "repelled the defence of preſcription, and "found the defender liable in payment of the ſums libelled."

But the opinion of the Court was, That the preſcription was *not excluded*, and ſo far they altered the Lord Ordinary's interlocutor; but found the defender liable on a different ground.

Lord Ordinary, *Swinton*. Act. *J. Pringle*. Alt. *Ruſſell*.
Clerk, *Robertſon*.

S.

N° CLXXVII.

N° CLXXVII. *November* 19. 1784.

DUNCAN ROBERTSON,

AGAINST

JOHN CLARKSON.

QUALIFIED OATH.—PRESCRIPTION,—*Sexennial, of Bills of Exchange.*

ROBERTSON purſued Clarkſon for payment of a bill which had undergone the ſexennial preſcription; ſo that the debt contained in it could not be proved but by the oath or writ of the debtor. What the latter alleged, and offered to *depone*, was, That the only value he got for the bill was a quantity of wine, which on trial he found to be totally unfit for uſe: That he recently intimated this diſcovery to the ſeller, who ſatisfied with the information, ſignified how unneceſſary it was to return the wine, as the price of it would not be demanded: And that in a vain attempt to meliorate it, he had expended a conſiderable ſum. Accordingly theſe allegations were underſtood as if made upon oath.

Pleaded for the purſuer: The defender has acknowledged the debt; and though he likewſe alleges that he ſuffered loſs from a defect he diſcovered in the quality of the wine, this exception, which is really a plea of compenſation, is extrinſic to his admiſſion, and cannot be eſtabliſhed but by a ſeparate action. Dict. of Deciſ. vol. 2. 3. *voc.* Qualified oath.

Anſwered: In a queſtion which relates to the conſtitution of a debt; it cannot be an extrinſic exception, that the debt never exiſted. And this is truly the plea of the defender, who only ſays ſo in explicit terms when he deſcribes the abſolute uſeleſſneſs of the ſubject, from the real value of which alone the debt could have ariſen; and who affirms that he recently made an offer of returning the wine, which was refuſed.

The Lord Ordinary "ſuſtained the defence of the ſexennial pre-"ſcription;" but the Court altered that interlocutor, and

"Repelled the defence of preſcription."

A reclaiming petition for the defender was afterwards refuſed, without anſwers.

Lord Ordinary, *Ankerville.* Act. *J. Grant.* Alt. *D. Armſtrong.*
Clerk, *Menzies.*

S.

N° CLXXVIII. *November* 19. 1784.

THOMAS DALZIEL,

AGAINST

LORD LINDORES.

PRESCRIPTION,—Vicennial of holograph deeds,—*Whether the verity of a holograph deed can be proved by the oath of the granter's heir, relative to the hand-writing alone.*

DALZIEL ſued Lord Lindores in an action founded on a holograph obligation granted by the father of the latter, upwards of twenty years preceding: the purſuer offering to eſtabliſh the verity of the writing by the oath of the defender.

Pleaded for the defender: The ſtatute of 1669, cap. 9. enacts, "That holograph miſſive-letters, and holograph bonds, and ſubſcriptions in count-books without witneſſes, not being purſued for within twenty years, ſhall preſcribe in all time thereafter, except the purſuer offer to prove, by the *defender's* oath, the verity of the ſaid holograph bonds and letters, and ſubſcriptions in the count-books." By the oath of the defender muſt here be meant that of the granter of the deed, who is the only perſon to whom inſpection of the writing can afford a ſufficient cauſe of knowledge of its *verity*. Such is the opinion of Sir George Mackenzie, in his Obſervations on this ſtatute, p. 430. If, however, the fact of granting the obligation were known to the heir, this might perhaps be referred to his oath, which of courſe would be an oath of knowledge; whereas any obſervation relative to the hand-writing could warrant nothing farther than an oath of credulity, by which the verity of the deed would not be proved; Bankton, b. 2. tit. 12, § 36.; Kilker. p. 441. 17th July 1741, Brown *contra* Crawford. In the preſent caſe, a reference to the defender's oath, who never heard of the writing before, would be vain and uſeleſs.

Anſwered: It is not the debt itſelf, but the probative quality of the holograph voucher, that is thus preſcribed; and the principle of the enactment accordingly is obvious. After the lapſe of *twenty* years, there

there may not, ſo eaſily as within that period, be found perſons whoſe acquaintance with the hand-writing of a party will enable them to detect any ſuppoſititious deed which may be aſcribed to him. This reaſon ſeems to indicate, that the oath of the granter's heir, rather than that of himſelf, was in the view of the ſtatute; becauſe, during his own life, the knowledge of his hand-writing would not naturally be loſt. The obſervation of Mackenzie appears thus to be ill founded; and it is farther contradicted by the deciſion of 3d July 1725, Graham, by which the oath of an heir was admitted in a like caſe. From that paſſage of Lord Bankton, indeed, in which he ſpeaks of an oath of credulity on this point as affording no evidence, the defender argues as if it were a maxim in law, that no one perſon can certainly diſtinguiſh the hand-writing of another, nor emit an oath of knowledge reſpecting it, unleſs he has ſeen it while executing. But the ſtatute itſelf, in the manner ſtated above, ſhews this to be a miſtaken idea. How elſe would there be more ſafety in permitting the authenticity of a holograph writing to be preſumed for a limited period only ſubſequent to its date, than during any length of time? Or, why have writings which are holograph, been thus privileged beyond ſuch as are not holograph? It is evident, that the law conſiders the identity of hand-writings to be as much matter of certain knowledge, as the identity of perſons, or of other external objects. As the defender's knowledge, therefore, of the writing in queſtion may be ſuch, the purſuer is entitled to make the trial by his oath.

The Lord Ordinary pronounced the following interlocutor: "Finds, "That the miſſive-letter libelled on, ſaid to have been granted by the "defender's father, falls within the vicennial preſcription eſtabliſhed "by the ſtatute 1669; and that the writer of that miſſive, being now "dead, the defender, his repreſentative, is not bound to ſwear as to "the verity thereof." But

The Court altered that interlocutor, and found, "That it was com- "petent for the purſuer to take the oath of the defender."

In conſequence of this interlocutor, the defender emitted the following oath: "That he has often ſeen, and is perfectly well acquainted "with the hand-writing of his father; and that he thinks the miſſive- "letter which is ſhown to him, and on which the action is founded, "is very like the hand-writing of his father, and ſuch, both in the bo- "dy and in the ſubſcription, as he was in the uſe of writing; but that "he cannot ſwear poſitively to its being his writing; and that he "could not ſwear to his own writing, it being different at one time "from what it is at another. And being interrogated, Whether, up- "on an inſpection of the foreſaid paper, he does believe it to be ho- "lograph of his father? he depones, That in conſequence of what "he had already ſaid, he cannot have a doubt of that."

"The Lord Ordinary having conſidered the foregoing depoſition, "found,

" found, That the defender's oath was only an oath of credulity; " and therefore aſſoilzied him from the action." But

The Court " found, That the oath did ſufficiently prove the verity " of the miſſive-letter."

A reclaiming petition preferred againſt this judgment was refuſed without anſwers.

Lord Ordinary, *Ankerville.* Act. *Nairne.* Alt. *Maclaurin, M'Cormick.* Clerk, *Menzies.*

S.

N° CLXXIX. *November* 26. 1784.

DOUGLAS, HERON and COMPANY,

AGAINST

ROBERT RICHARDSON.

PRESCRIPTION.—*Sexennial of Bills of Exchange, how interrupted.*

DOUGLAS, HERON and COMPANY, in 1781, raiſed an action for payment of certain bills which had become payable more than ſix years before its commencement. Theſe bills were all of them proteſted, and moſt of the proteſts were regiſtered. Within the ſtatutory period, too, they had been all produced in a proceſs of ranking and ſale of the debtor's eſtate; and on ſome of them, in which there were other obligants beſides the party now ſued, diligence had been done againſt thoſe perſons. The defence of the ſexennial preſcription having been urged, it was

Pleaded for the purſuers: The preſcription has been interrupted in three different ways: *Firſt*, By the proteſt and regiſtration, which import a legal demand of payment, a document taken on that demand, and a preparation made for the execution of diligence: *Secondly*, By the production of the bills in the proceſs of ranking and ſale, in the ſame manner as if that common action had been a particular one, inſtituted for the behoof of the purſuers alone. And, *laſtly*, It has been interrupted, by timely diligence done on theſe bills, though againſt other obligants, agreeably even to the terms of the ſtatute of 1772, which mentions in general the raiſing of diligence, or the commencement of action. This mode of interruption is eſtabliſhed in regard to the long preſcription; Bankton,

b. 2. tit. 12. § 64.; Erſkine, b. 3. tit. 7. § 46.; Dict. of Deciſ. *voce* Preſcription: And it does not appear to be leſs applicable to the ſhorter ones *.

Anſwered: A proteſt and regiſtration are not equivalent even to the raiſing of diligence, much leſs its execution; both of which the ſtatute requires to produce interruption. As little effect had the exhibition of the bills in the above mentioned proceſs; agreeably to what was determined in the laſt reſort, in the ſimilar caſe of Hay *contra* King's Advocate, 27th July 1757. Nor could diligence done againſt other obligants create the interruption in queſtion.

The Lord Ordinary "repelled the defence of preſcription." And

On adviſing a petition, reclaiming againſt that judgement, with the anſwers, the Court, conſidering the proteſts, though regiſtered, as inſufficient to interrupt preſcription, and it being unneceſſary to notice the few bills on which diligence had been done, "found that "the grounds of the debts in queſtion having been produced in the "proceſs of ranking, was a ſufficient interruption of the preſcription."

Lord Ordinary, *Elliock.* Act. *Blair.* Alt. *Dalzell.*
Clerk, *Orme.*

S.

N° CLXXX. *November* 26. 1784.

WILLIAM LENOX, and others,

AGAINST

ROBERT GRANT.

SERVICE AND CONFIRMATION.—*Confirmation as executor of a general diſponee, who had not been confirmed, nor in poſſeſſion, not ſufficient to give right of action reſpecting the ſubjects diſponed.*

DAVID MARSHALL granted to Katharine Naſmith his wife, a general diſpoſition, *mortis cauſa*, of his effects, among which was a bond due to him by Mr Roberton of Bedlay. She again, after his death, executed a ſimilar conveyance *omnium bonorum*, in favour of Robert Grant; but did not *expede* a confirmation as executrix of her huſband. Grant however obtained himſelf confirmed executor *qua* diſponee to her; and having given up in inventory the above-mentioned bond, deduced, on that title, an adjudication againſt the eſtate of Bedlay. Afterwards, in the ranking of the creditors on this eſtate,

* *Vid. ſupra*, p. 249.

Mr Lenox and others objected to the validity of that adjudication, and

Pleaded: Confirmation is *hæreditatis aditio in mobilibus;* and Katharine Naſmith having died unconfirmed, the bond in queſtion ſtill remained *hæreditate jacente* of Marſhall; ſo that a title to it could not be eſtabliſhed by a confirmation as executor of the former, *in bonis* of whom it was not. It would be inconſiſtent to ſuppoſe that it could; though indeed the confirmation of a perſon not entitled to the office of executor, will, as it is the ſentence of a competent court, ſtand good till legally reduced, no ſuch contradiction being there implied. It muſt at leaſt be admitted, that Katharine Naſmith had not the *jus exigendi.* How then could this be transferred by confirmation as her executor?

Anſwered: It is clear, that if Katharine Naſmith, unconfirmed as ſhe was, had died inteſtate, her own heirs, and not thoſe of her huſband, would have ſucceeded to the right of this bond, which therefore could be no longer *in bonis* of the latter: A fact that alone ſhews the oppoſite argument to prove nothing, as proceeding on a *petitio principii.* The ſame circumſtance likewiſe evinces, that the effect of confirmation, in ſuch caſes, is not to veſt the right of property. Its only purpoſe then muſt be to give the *jus exigendi;* and of courſe it is an inſtitution ſolely deſigned for the ſafety of the debtor. A ſubject may, notwithſtanding a general diſpoſition, have been ſpecially aſſigned; ſo that if the debtor in the ſubject were to pay or deliver it to the general diſponee, he might be obliged to render a ſecond payment or delivery to the ſpecial legatee. Againſt this hazard he ought to be protected; and accordingly the caution found in confirmation affords him the ſecurity required; after which he can have no intereſt nor title to diſpute as before the *jus exigendi.* Such was the caſe of the debtor in the bond in queſtion; and it is abſurd to ſay that he had then the ſame title to object which he would have had prior to confirmation, or in the lifetime of Katharine Naſmith. Nor does it follow, becauſe if ſhe had procured herſelf confirmed, it muſt have been *qua* executrix to her huſband, that the preſent confirmation as executor to her is erroneous. Though undoubtedly ſhe could not be her own executrix, and of neceſſity muſt have obtained confirmation in the character of that of her huſband, is that any reaſon why her general diſponee may not be her executor? Beſides, this confirmation being a *res judicata* by the Commiſſaries decree, muſt, notwithſtanding the diſtinction that has been attempted, be held *pro veritate*, till ſet aſide by a reduction.

A majority of the Court ſeemed to conſider confirmation in the perſon of a general diſponee, as eſſential for transferring to him the right of property or *jus in re;* and that Katharine Naſmith having obtained none, was hot veſted with this right; which therefore could not be tranſmitted to her diſponee, by confirmation as her executor. Some of the Judges, on the other hand, contended, that the confirmation,

confirmation, however erroneous, yet not being brought under reduction, ſhould have full effect.

The Lords "ſuſtained the objection to Robert Grant's adjudica-"tion."

Lord Ordinary, *Ankerville*. Clerk, *Home*. For Objectors, *C. Hay*. Alt. *J. Grant*.

S.

N° CLXXXI. *December* 7. 1784.

ISABEL HOWISON,

AGAINST

JOHN HOWISON.

PRESCRIPTION.—*Act* 1695 *ſtrictly interpreted.*

THree perſons granted a joint bill to the father of Iſabel Howiſon; in reference to which, and bearing the ſame date with the bill, John Howiſon addreſſed to him the following obligatory letter: "Sir, "Whereas James, John, and William Young have, of this date, "granted to you a conjunct bill for the ſum of L. 100, payable one "day after date; therefore, for your father ſecurity, I hereby pro-"miſe, that the ſaid ſum of L. 100, and intereſt due thereon, ſhall be "paid to you, or order, *when demanded.*"

Long after the expiration of the period of the ſexennial preſcription of bills, Iſabel Howiſon raiſed an action againſt the co-acceptors, and likewiſe againſt John Howiſon, the other obligant. Decreet in abſence was obtained againſt the acceptors. But the other defender

Pleaded: Firſt, The bill itſelf being preſcribed, the collateral obligation, as acceſſory to it, has become likewiſe void.

Secondly, As a cautioner, this defender is liberated by the ſeptennial limitation eſtabliſhed by the ſtatute of 1695. It is clear, that this benefit belongs to every obligant as cautioner in a bond, though it contains no ſtipulation of relief, and though no ſeparate bond of relief has been intimated to the creditor; 11th December 1729, Roſs *contra* Craigie, Dict. *voce* Preſcription. Now, as in this matter there can be no charm connected with any peculiar phraſe, it is ſufficient, if the obligation be ſo conceived as to point out clearly the character of cautioner, whether that particular appellation occur in it or not. Such is the

the obligation in queſtion, expreſsly bearing to be granted in farther ſecurity of another obligation by different perſons, executed at the ſame time; by which laſt circumſtance it is diſtinguiſhed from a corroborative deed.

Anſwered: The exception of preſcription in regard to the bill is obviated by the decreet of the Court. Nor can a party who is not expreſsly bound as cautioner, in ſo many words, plead the benefit of the ſeptennial limitation, unleſs he can claim under ſome other of the ſtatutory requiſites; Dict. vol. 2. 3. *voce* Preſcription.

The Lord Ordinary pronounced this judgement: "In reſpect of "the decree againſt the debtors in the bill, and that the ſexennial "preſcription does not apply to this bill, repels the defence founded "on the ſexennial preſcription of bills: but with reſpect to the de"fence founded on the ſeptennial preſcription, finds, that the bill in "queſtion being granted for value received in caſh, that value muſt be "preſumed to have been received by the three acceptors; and there"fore the defender, who grants the letter in queſtion, muſt be under"ſtood to be the cautioner; and as the letter bears that he is bound in "ſecurity, it is the ſame thing as if, in terms of the act, he had been "bound expreſsly as a cautioner; in which caſe no bond or obligation "of itſelf would have been neceſſary; therefore, upon this ground "alters the interlocutor, and finds the defender not liable for the debt."

The Court, however, "found, That John Howiſon's caſe did not "fall under the act 1695; but adhered to the Lord Ordinary's inter"locutor with reſpect to the ſexennial preſcription."

Lord Ordinary, *Monboddo.* Act. *Honyman.* Alt. *Macleod.* Clerk, *Colquhoun.*

S.

N° CLXXXII. *December* 11. 1784.

ROBERT DAVIDSON,

AGAINST

DANIEL MURRAY.

ARRESTMENT—*Not competent to attach houſehold-furniture in the occupation of a third party.*

DUNCAN MACFARLANE ſubſet a houſe, of which he was the tenant, to Peter Wilkie, for a definite period; and, alongſt with the houſe, he let the greateſt part of the furniture, which was his own property. On

On Macfarlane's removal, accordingly, Wilkie entered into the *ſole* and *excluſive* poſſeſſion of the houſe and of the furniture.

Davidſon, a creditor of Macfarlane's, arreſted the furniture as in Wilkie's poſſeſſion; and a ſequeſtration of Macfarlane's effects was likewiſe awarded; but this happened more than *thirty* days poſterior to the arreſtment. A competition, however, enſued between Davidſon, and Murray, factor under the ſequeſtration, which depended on this point, Whether or not the above arreſtment was a habile and effectual diligence.

The Lord Ordinary "found, That arreſtment in this caſe was an "improper and inept diligence; and therefore preferred the factor."

In a reclaiming petition it was pleaded: All moveable effects of a debtor muſt be ſubject to the diligence either of arreſtment or of poinding. The operation of the laſt is an immediate and complete transference of property; and, by conſequence, the proprietor's right of poſſeſſion is here preſuppoſed. The forms, too, by which this diligence is executed, indicate the ſame idea; there being eſſential to theſe, the aſſuming of poſſeſſion, and the carrying of the goods to the market-croſs. For to deprive, either during a longer or a ſhorter period, of a poſſeſſion which he holds by legal right, any one man for the debt of another, whether the proprietor or not, would be a violation of juſtice. As this arreſtee, then, had ſuch a title to the excluſive poſſeſſion of the ſubjects in queſtion, it follows, that here poinding could not take place.—Arreſtment, on the other hand, is undoubtedly the proper diligence to attach moveable effects, whether fungibles, as money, or *ipſa corpora*, while in the poſſeſſion of third parties. It has indeed been queſtioned, whether they could be arreſted in the hands of a mere depoſitary, ſince he might not be deemed to hold the proper poſſeſſion; but even in that caſe, this diligence was found competent; Fac. Coll. 10th December 1760, Creditors of Appin. An incongruity has been figured to ariſe in the arreſtment of houſehold-furniture, from the embarraſſment to which the temporary occupier of a room in another perſon's houſe might be thus expoſed; and it has been likewiſe ſaid, that on the ſame principle a traveller might be made the arreſtee of his poſt-chaiſe. But it was not perceived that in thoſe inſtances the poſſeſſion, not transferred to the temporary occupier, would ſtill be held by him in the right of the owner.

The Court were of opinion, That poinding was the only proper diligence in this caſe, though it could not have its full effect before the right of poſſeſſion expired; but that the temporary infringement of that right, being eſſential to the form of execution, was to be ſubmitted to.

The Lords therefore refuſed the petition without anſwers.

Lord Ordinary, *Gardenſton.* For Petitioner, *W. Steuart.* Alt. *A. Burnet.*

S.

N° CLXXXIII. *December* 15. 1784.

CHARLES GORDON,

AGAINST

HARRY GARDENER.

FRAUD.—*A ſale made to and on the credit of a merchant inſolvent, and againſt whom ultimate diligence, from which he had formerly ſought protection in a ſanctuary, was ſtill ſtanding undiſcharged, not reducible on the head of fraud.*

ROBERT DALZELL, a merchant, purchaſed from Gordon two copper ſtills of conſiderable value, and for the price of them, which were delivered to him, granted bills. But within *three* months after the tranſaction, and before the bills were payable, Dalzell was impriſoned, in conſequence of ultimate diligence, which had been raiſed ſeveral years before, and had obliged him, more than one year preceding, to betake himſelf to the ſanctuary of the Abbey of Holyroodhouſe. An action of reduction of this ſale having been inſtituted by Gordon on the head of fraud and circumvention, Gardener, as factor for the creditors of Dalzell, of whoſe effects a ſequeſtration had been awarded,

Pleaded, in defence: Dalzell, though perhaps inſolvent at the time of the bargain, did not become bankrupt until three months after that period. As he was then proceeding in buſineſs, he might, like any other merchant in ſuch circumſtances, indulge a reaſonable expectation of retrieving his affairs, and the law will therefore preſume that he tranſacted *bona fide*. In the caſe of Cave's creditors, it was found, that the *preſumptive fraud* ought to be limited to the ſpace of *three days* preceding bankruptcy, Dict. of Deciſ. vol. 1. *voce* Fraud. As little reaſon is there, on the other hand, to preſume deception ſuffered by the purſuer, who, from the place of his reſidence, had acceſs to learn the ſituation of the defender.

Anſwered for the purſuer: That which diſtinguiſhes this caſe, is the circumſtance of Dalzell, at the date of the tranſaction, lying under ultimate diligence undiſcharged, which before had obliged him to commit an act of bankruptcy, by retiring to a ſanctuary, and was ready every moment to be put again in execution, as it actually happened within three months afterwards. In ſuch a precarious ſituation, he had nothing to hope from purſuing the profeſſion of a merchant, which muſt depend for ſucceſs on exerting a regular and uninterrupted train of induſtry, the proſpect of which was thus removed from him. He was therefore guilty of fraud; and *dolus dans cauſam contractui, reddit*

dit contractum nullum; Dict. of Decis. vol. 1. 3. *voce* Fraud. Nor is the circumvention of the pursuer to be questioned, unless by supposing him desirous of the loss of his property.

The Lord Ordinary found, "That the circumstances of the case "did not qualify a deception or fraud sufficient to set aside said sale, "upon which delivery had followed, and assoilzied the defender." And a reclaiming petition having been preferred by the pursuer,

The Court, on advising it with answers, "adhered to the interlo- "cutor of the Lord Ordinary."

Lord Ordinary, *Henderland.* Act. *W. Steuart.* Alt. *Rolland.* Clerk, *Menzies.*

S.

N° CLXXXIV. *December* 16. 1784.

WLLIAM HAMILTON and JOHN REID,

AGAINST

The CLERKS in the High Court of ADMIRALTY.

ADVOCATION, *from the High Court of Admiralty, competent, in mercantile causes, at any time before extract.*

WILLIAM HAMILTON and JOHN REID instituted in the High Court of Admiralty an action for the profits of a mercantile adventure, in which the Judge pronounced several interlocutors in favour of the defenders.

After the last of these had become final, the pursuers applied by a bill of advocation to the Court of Session; but the clerks in the Court of Admiralty refused to transmit the process until they obtained payment, or a composition for their dues of extract; and

Pleaded: Though with regard to sentences pronounced by other Judges, it has been held, that advocation is competent at any time before extract, Nov. 1766, Wright *contra* Taylor, the law is different in questions depending before the Court of Admiralty. As in cases strictly maritime, which are the proper subject of that jurisdiction, the sentences of the Judge can be set aside only by reduction; so it has been found, that even in those of a mercantile nature, the parties, by voluntarily resorting to that tribunal, have subjected themselves to all the peculiarities attending it, as in the case of Cairns *contra* Jackson; Fount. 24th Jan. 1699: A decision which ought to be followed to the effect, at least, of securing to the officers of that court their just

juſt emoluments, eſpecially where the attempt to advocate comes from the purſuer in the original action.

Anſwered: By ſubmitting their cauſe to the deciſion of the Judge-Admiral, in a caſe like the preſent, parties, it is true, confer juriſdiction on a Judge otherwiſe incompetent. But they do not at the ſame time convert a cauſe purely mercantile, in which the Judge-Admiral is poſſeſſed only of the ordinary powers, into one of a maritime nature, in which his proceedings can be brought under review by reduction alone. It was from not attending to this obvious diſtinction, that the determination quoted on the other ſide was given; from which indeed it would not merely follow, that the clerks in the Court of Admiralty could not be compelled to deliver, without a compoſition, the papers lodged in actions of a commercial nature, but that the remedy by advocation was there altogether inadmiſſible.

The Lords found, "That the clerks in the Court of Admiralty "were obliged, without any compoſition, to tranſmit the proceſs to "the Court of Seſſion."

Lord Reporter, *Ankerville.* Act. *Geo. Ferguſſon.* Alt. *Solicitor-General Dundas.*

C.

N° CLXXXV. *December* 16. 1784.

JANET MASON,

AGAINST

JOHN HENDERSON.

PACTUM ILLICITUM.—*Act.* 19. *Geo. II. c.* 37. *Bonds at* reſpondentia, *how far capable of being confirmed by collateral ſecurities.*

THE ſon of John Henderſon, an officer in one of the ſhips belonging to the Eaſt-India Company, obtained from Alexander Robertſon a loan of L. 100, upon his bond at *reſpondentia.* Within thirty days after the return of the veſſel, he was to pay L. 122, and L. 1, 2 s. for every month thereafter. As an additional ſecurity, John Henderſon likewiſe became bound, in the ſame event, to make payment of the monies advanced.

The ſhip referred to, completed the voyage; but the borrower remained in India: And Janet Maſon, the executrix of the original creditor, purſued John Henderſon for the debt.

Pleaded in defence: By ſtatute 19. Geo. II. c. 37. it was enacted, "That

" That all monies lent on bottomry, or at *reſpondentia*, on veſſels to " or from the Eaſt Indies ſhall be expreſsly lent *only* upon the ſhip, " or upon the merchandiſe." The ſtipulation elicited from the defender, therefore, by which the creditor obtained a collateral and perſonal ſecurity, was altogether illegal and void.

Anſwered: The extraordinary intereſt ſtipulated in contracts of bottomry, and *reſpondentia* bonds, was only permitted at common law, becauſe compenſated by the unuſual riſk run by the lender. But the addition of collateral ſecurities, entitling the creditor to demand payment whether the adventure prove ſucceſsful or not, would totally change the nature of the bargain, and render it a cover for uſury and oppreſſive dealings. And to ſuch agreements alone the ſtatute of the late King was meant to extend.

But it never could be intended to annul obligations ſuch as the preſent, where nothing is exigible, either from the debtor or his ſurety, until the arrival of the ſhip. Here the creditor's purpoſe is not to ſecure himſelf againſt the hazards of the adventure, but againſt the inſolvency of his debtor, which, after the voyage had been ſucceſsfully performed, might have diſappointed him of his payment. Nothing accordingly is more frequent in practice than ſtipulations of this ſort. Without them, indeed, in caſe of the borrower's not returning along with the ſhip, the creditor's claim would be entirely fruſtrated.

The Lord Ordinary over-ruled the defences: To which judgement the Lords adhered, after adviſing a reclaiming petition for John Henderſon, with anſwers for Janet Maſon.

Lord Ordinary, *Gardenſton.* Act. *Whyte.* Alt. *Mark Pringle.*
Clerk, *Home.*

C.

N° CLXXXVI. *December* 21. 1784.

EDWARD COWAN,

AGAINST

JOHN MARSHALL.

CAUTIONER—*In a ſuſpenſion, how far liable, when the charger's right is ſet aſide.*

A Charge of horning having been uſed againſt the acceptors of a bill of exchange, they obtained ſuſpenſion on this ground, That the perſons in whoſe behalf the charge was given, were debtors to them to a much greater amount.

The original holder of the bill in queſtion, Edward Cowan, inſtituted an action for ſetting aſide the charger's right. After this proceſs of reduction had been conjoined with the ſuſpenſion, he inſiſted for a decreet, not only againſt the ſuſpenders, but alſo againſt John Marſhall, who had become their cautioner in the ſuſpenſion.

In ſupport of this demand, ſo far as regarded the cautioner, Edward Cowan

Pleaded: The purpoſe of introducing cautionary obligations in ſuſpenſions was, that the ſums contained in the decreet under challenge, might be recovered, if ultimately found due. The obligation of the cautioner is therefore, by the modern uſage, ſuſtained to the ſame extent with that of the principal party; nor can the former be diſcharged while the latter remains bound. Erſkine, book 3. tit. 3. § 71; Act of Sederunt, 29th January 1650, 27th December 1707; Kames's Rem. Dec. N° 8.; Act of Sederunt 1717.

Anſwered: Where a ſuſpender does not controvert the validity of the charger's claim, but only inſiſts, as in multiple-poindings, that he ſhall pay with ſafety, his cautioner is juſtly found liable, though another party ſhould, in the competition, be preferred to the charger. It is the true meaning of ſuch an interpoſition, that upon the ſuſpender's being warranted againſt future claims, the ſurety, in his default, ſhall make good the debt. In like manner, when during the pendency of a ſuſpenſion, a third party is brought by arreſtment or aſſignation into the place of the original charger, the benefit of the cautionary obligation, as acceſſorial to the right itſelf, will at the ſame time be transferred to the aſſignee or arreſter.

The difference, however, between caſes ſuch as theſe and the preſent, is ſufficiently obvious. Here, in the queſtion between the original chargers and thoſe who obtained the ſuſpenſion, the plea of compenſation urged by the latter was unqueſtionably relevant to free them from every claim. The ſame defence would have been equally effectual, in a queſtion with the purſuer, if coming by aſſignation into the place of the original chargers; and it is only by means of a reduction in which the charger's right is ſet aſide, from circumſtances entirely unknown when the ſuſpenſion was obtained, that any thing can be demanded from the ſuſpenders themſelves. Agreeably, therefore, to the deciſions quoted on the other ſide, in which the cautioner was held to be bound, not according to the *words* merely, but to the *ſpirit* of his engagement, his obligation in the preſent caſe muſt be completely diſſolved. The ſtate of the queſtion, to which his interference was ſolely applicable, is now in every reſpect eſſentially altered and departed from. Fount. 5th July 1706, Macdougal.

The Lord Ordinary found, "That in reſpect there was a relevant "reaſon of ſuſpenſion againſt the original chargers, the cautioner in "the ſuſpenſion muſt be free, although, in the final event of the con"joined proceſſes of reduction and ſuſpenſion, the purſuer ſhould "ſucceed

" ſucceed in the reduction, and in conſequence thereof ſhould be en-
" titled to a decreet finding the letters orderly proceeded."

Upon adviſing a reclaiming petition, with anſwers, the Lords adhered to the judgment of the Lord Ordinary.

Lord Ordinary, *Braxfield.* Act. *Maclaurin.* Alt. *Cullen.* Clerk, *Menzies.*

C.

N° CLXXXVII. *December* 21. 1784.

GEORGE-ALEXANDER GORDON,

AGAINST

JANET GORDON.

PRESCRIPTION.—*How far interrupted by the minority of ſubſtitute heirs.*

MR GORDON of Whiteley, in 1730, executed an entail of that eſtate in favour of Alexander his ſon, and his heirs-male; of Charles Gordon his nephew, and his heirs-male; and of other more remote relations, to the excluſion of Janet his daughter.

In 1737, however, Alexander, who did not make up titles under the entail, took infeftment in the lands, in virtue of a precept of *Clare conſtat*, which he obtained from the ſuperior.

He lived until 1783; at which period, on his dying without iſſue, the next heir of the entail was George-Alexander, the ſon of Charles Gordon, who had died in 1775, when, it is to be remarked, George-Alexander was only two years of age.

Alexander having thus poſſeſſed the eſtate for more than forty years, under unlimited titles, his ſiſter and heireſs of line, Janet Gordon, on the ground of his having by preſcription acquired immunity from the fetters of the entail, claimed the property in preference to the heir of tailzie; while he, on the other hand, contended, that, as in 1775, four years preceding the expiration of the ſtatutory period, he became the immediate ſubſtitute to Alexander, his minority had interrupted the farther courſe of preſcription. The queſtion then which came to be agitated was, how far the minority of a ſubſtitute heir of entail could effect an interruption of the poſitive preſcription.

Pleaded for the heireſs of line: As the poſitive preſcription chiefly reſpects landed property, the abſolute ſecurity of which is ſo eſſential to public welfare, its courſe ought not to be interrupted by minority, concerning which the records can afford no information. It is

is on this principle that idiots, lunatics, and thoſe perſons who, from forfeiture, are rendered *non valentes agere*, though the ſituation of them all is as favourable as the ſtate of minority, have not been excepted in the ſtatute of 1617. Nor indeed does the exception of minors contained in that enactment, refer to the poſitive preſcription; being confined to that part of it which extends the negative to rights affecting land.

But though, in other caſes, the courſe of poſitive preſcription were to be interrupted in behalf of minority, this privilege ought not to be extended to ſubſtitute heirs of entail; becauſe, among them, minors might always be found, ſo as to create a perpetual interruption, and exclude preſcription where it is undoubtedly applicable, Bankton, vol. 2. p. 163. On this ground, the privilege was denied to an hoſpital for perſons under age; Fountainhall, 17th December 1695, Fiſher *contra* Hepturn. Nor would the evil be prevented even by limiting the deduction of minority to the neareſt heir in ſubſtitution; for though not by the co-exiſtence, yet by the ſucceſſion of minors, the interruption might be continued without end. After all, this reaſoning truly tends not to infringe the rights of minority, which can hardly belong to a ſerious of heirs of entail. Under ſuch a ſettlement, two diſtinct intereſts only ariſe, the intereſt of the heir in poſſeſſion, and that of the ſubſtitutes in expectation. To each of theſe laſt, indiſcriminately, whether nearer or more remote, an action is competent for the protection of a right, which is thus evidently common to all of them. As holding then one individual common right, thoſe ſubſtitutes are to be viewed in the light of a collective body, or *unum quid*, the exiſtence of which depends not on any ſpecific number of component parts; and, conſequently, unleſs this body conſiſt entirely of minors, it can have no claim to any of the privileges of minority. For farther illuſtration, ſuppoſe a private proprietor to incloſe in his grounds a part of a public road, and ſo to poſſeſs it unchallenged for the years of preſcription. Now, though every one of the people had a title to challenge his proceeding, it is clear the preſcription would not be interrupted by the minority of individuals among them.

A ſimilar queſtion was decided in conformity to theſe obſervations in the caſe of Macdougal *contra* Macdougal, 10th July 1739, Kilkerran.

Anſwered: The above criticiſm on the arrangement of the clauſes in the ſtatute is far too frivolous to warrant the ſuppoſition that the exception of minority was not intended to apply to preſcription in general, whether poſitive or negative; terms, indeed, which do not occur in the ſtatute, and expreſſing a diſtinction which ſeems to have little foundation. That fancied limitation was unknown to Lord Stair, b. 2. tit. 12. § 18. or to Sir George Mackenzie, Obſ. 2. 7.; and it is contradicted by the deciſions of the Court; Ged *contra* Baker, 5th December 1740, Kilkerran; Hamilton-Blair *contra* Sheddan, 6th December 1754. As little reaſon is there for exempting from this interruption, preſcription againſt heirs of entail, each of whom has a *jus crediti*, which gives ſuch an intereſt in the entailed eſtate as the law recogniſes,

cogniſes, and its diligence will protect. The ſtatutory words comprehend that caſe as much as any other; nor do the objections of the oppoſite party prove that it ought to have been omitted. If, as has been ſaid, ſuch a preſcription were indeed to become ſubject to perpetual interruption, that conſequence would not be more anomalous than the alternative equally unavoidable on the other ſide, of an abſolute exemption from interruption. Indeed, the poſſibility of perpetual interruption is inherent in the nature of the caſe, and it is acknowledged in regard to the negative preſcription. But in the preſent inſtance, the circumſtances are ſuch as to obviate it. For this claimant pleads upon his own minority alone; and perhaps there would be ſome impropriety in an heir of entail founding any claim on the right of a predeceſſor with whom he is not connected as ſuch. It is clear, then, that while with reſpect to a fee-ſimple, the extent of this interruption may be indefinite, it never can, in ſuch a caſe as the preſent, exceed the ſtatutory period by more than twenty-one years. Nor is it a better founded argument, that heirs of entail ſhould be conſidered as a collective body, unſuſceptible in conſequence of the privilege in queſtion. So far from there being a common right to conſtitute ſuch a community, no ſucceſſion of one heir can take place without the excluſion of the reſt; and though ſeveral heirs may have at the ſame time a *ſpes ſucceſſionis*, it is in each of them as diſtinct a right as the object of it is different. And thus the ſuppoſed example of preſcription reſpecting a high-road appears quite foreign to the preſent argument, becauſe there a common right would truly have exiſted in the public. The deciſion in the caſe of Macdougal is indeed contrary to the argument now maintained; but having been paſſed by a narrow majority, it may on that account have leſs authority as a precedent.

This queſtion, which aroſe upon a competition of brieves, was reported to the Court by the Lords Ordinary, who ſat as aſſeſſors to the macers of Court. And

The Lords found, "That the years of George-Alexander Gordon's "minority, from 1775, when his father died, fell to be deduced "from the years of preſcription."

On adviſing, however, a reclaiming petition againſt that interlocutor, the Court appointed a hearing in preſence; after which it was

Obſerved on the Bench: As preſcription operates in favour of that perſon only who holds poſſeſſion, ſo the privilege of minority to interrupt is competent to none who have not the right of claiming poſſeſſion, not contingent but preſent. On this principle proceeded the judgment in the caſe of Macdougal; as did alſo the deciſions in that of Leſlie Johnſton of Knockhill, and in that of Sir Samuel Maclellan's children. Accordingly,

The Lords altered their former interlocutor, and found, That the

years of George-Alexander Gordon's minority were not to be deduced from the years of preſcription.

Reporters, Lords *Alva* and *Henderland*. For the heir of entail, *Solicitor-General Blair*.
Alt. *Lord Advocate, Maclaurin, Honyman*. Clerk, *Robertſon*.

S.

N° CLXXXVIII. *December* 23. 1784.

DOUGLAS, HERON, and COMPANY,

AGAINST

DUNMORE and COMPANY.

ADJUDICATION. *Act* 23. *Geo.* III. *cap.* 18.—*How far the ſtatutory proof of bankruptcy is requiſite to entitle a creditor to be conjoined in the firſt adjudication.—What is meant by the "Creditors being in readineſs to adjudge."*

DUNMORE and Company obtained a decreet of adjudication againſt a debtor of theirs, as charged to enter heir to his predeceſſor. Afterwards Douglas, Heron, and Company, who had likewiſe uſed a ſpecial charge againſt the ſame perſon, though the *induciæ* were not as yet expired, preferred a repreſentation to the Lord Ordinary in the proceſs of adjudication, craving to be conjoined, in terms of the late ſtatute. To this procedure Dunmore and Company objected, and

Pleaded: It is only with regard to the eſtates of ſuch perſons as have been rendered *bankrupts*, that a firſt adjudication can be uſed in the manner preſcribed by this act. This is apparent from the preamble of the ſtatute ſpecifying, as its object, "the leſſening of the "expence of diligence on bankrupt-eſtates;" and likewiſe from the care taken to aſcertain and extend, by a particular clauſe, the qualifications of bankruptcy formerly known. An enlargement, indeed, of the reverſion accruing to the debtor himſelf, attained at the hazard of his competing creditors, never could be intended. Nor could the benefit of this ſtatute, at any rate, be aſſumed in this inſtance by Douglas, Heron, and Company, becauſe, till the *induciæ* of their ſpecial charge be expired, they are not "in readineſs to adjudge;" a circumſtance peculiarly required in all caſes of this kind.

Anſwered: The chief purpoſe of this enactment was, to provide a ſpeedy and equal diſtribution of the effects of merchants and traders who had become bankrupts; and hence the criterions of inſolvency, as eſtabliſhed by the ſtatute 1696, were ſo increaſed, as to be more accurately accommodated to the ſituation of that claſs of men.

men. The clauſe, however, by which this diſpute muſt be determined, is quite general. It enacts, That "the Lord Ordinary, be-"fore whom *any* proceſs of adjudication is called, ſhall make in-"timation," &c. In order, too, as it ſhould ſeem, more clearly to remove the preſent queſtion, the appellation of *bankrupt*, uſed in all the other clauſes of the ſtatute, is here ſtudiouſly amended into that of *common debtor*, its declared purpoſe being, "that any other credi-"tors of the *common debtor* who may think proper to adjudge, and "are in readineſs for it, may produce the inſtructions of their debts," &c. Such an interpretation, indeed, is eſſentially neceſſary; ſince, to require the ſtatutory proof of bankruptcy previouſly to a conjunction of the adjudications, far from leſſening the expence of diligence, would greatly add to it. The other objection ſeems equally ill founded. Were this enactment confined to thoſe who formerly could have demanded a decreet of adjudication, no creditor, unleſs he had not only executed a ſummons of adjudication, but had alſo called it before the Lord Ordinary, could derive any advantage from it.

The Lords over-ruled the firſt objection, but ſuſtained the ſecond. And

Found, "That the days of the ſpecial charge uſed by Douglas, He-"ron, and Company, not being yet expired, they were not entitled "to be conjoined in the adjudication led by Dunmore and Company."

Lord Reporter, *Rockville*. For Dunmore and Company, *Honyman*. For Douglas, Heron, and Company, *Blair*. Clerk, *Colquhoun*.

C.

N° CLXXXIX. *December* 25. 1784.

MARJORY MACPHERSON,

AGAINST

WILLIAM TOD.

RANKING AND SALE—*muſt comprehend the whole eſtate of the debtor.*

THE lands of Benchar, wadſetted more than a century before by the family of Borlum, had been included in the adjudications led againſt the preſent Borlum. They were likewiſe mentioned as belonging to him in the action brought for ſelling his eſtate. No proof, however, of their value was taken, and they were altogether diſregarded in the ſubſequent proceedings.

After the other lands had been advertiſed for ſale, Marjory Mac pherſon, one of the creditors, applied to the Court, by petition, inſiſting, that the reverſionary right of the lands of Benchar ſhould be ſold

ſold at the ſame time with the other eſtate of the debtor. In this ſhe was oppoſed, by the ſuperior of theſe lands claiming the reverſion, in virtue of a quinquennial retour; by the wadſetter, who claimed the property, in conſequence of certain adjudications ſaid to be fortified by the long preſcription; and by William Tod, the purſuer of the action of ſale, who contended, That the reverſion of theſe lands appeared to belong to the heirs of line of the family of Borlum, in excluſion of the common debtor, who was the heir-male. But the Lords found, "That the ſale could not proceed until it was deter-"mined whether the lands of Benchar, or the reverſion thereof, did "belong to the common debtor." In a reclaiming petition for William Tod, it was

Pleaded: The rule, that a judicial ſale muſt include the debtor's whole eſtate, can only hold with regard to his undiſputed property, Fount. 22d February 1712, Creditors of Ramſay ſupplicants. To expoſe to ſale, in its unaſcertained ſtate, a diſputable matter or claim competent to him, would tend to depretiate it, and ſo hurt his intereſt. On the other hand, to compel his creditors, though unacquainted with the nature of his rights, and not poſſeſſed of his title-deeds, to bring thoſe claims to a concluſion, ſo as to derive from them an adequate price, would be equally prejudicial to them. Such certainly would be the conſequences of obliging the creditors to diſcuſs their debtor's right to this reverſion, relinquiſhed as it has been by him and his predeceſſors for a century paſt, and now claimed by a variety of competitors, to ſome of whom, after a tedious litigation, and an expence perhaps equal to the whole acceſſible funds of the bankrupt, it may be ultimately found to belong.

Theſe arguments had no weight with the Court. The purſuers of a judicial ſale, it was obſerved, were not obliged indiſcriminately to follow out every claim ſuggeſted to them by the debtor himſelf, or by his creditors. But where an eſtate had been comprehended in the adjudications led by the creditors themſelves, and enumerated in the action of ſale, as belonging to the debtor, it was incumbent on them either to bring it to ſale along with the other lands, or to ſhow in the cleareſt manner that it did not in truth belong to him.

The Lords refuſed the petition without anſwers.

Lord Ordinary, *Hailes.* For the Purſuer in the ſale, *Tait.*
For Marjory Macpherſon, *Mackintoſh, Elphinſton.* Clerk, *Menzies.*

C.

N° CXC.

N° CXC. *December* 22. 1784.

RICHARDSON and Company,

AGAINST

JAMES STODART, and others.

PERICULUM.—POLICY OF INSURANCE.—*Barratry of ſhipmaſter.*

STODART, and others, underwrote a policy of inſurance, which was opened by Richardſon and Company, on a cargo of *ſalmon*, to be ſhipped for Venice, where it was intended to arrive during the ſeaſon of Lent. Having met with unfavourable and tempeſtuous weather, which obliged him to throw overboard a part of the cargo, the ſhipmaſter, after a tedious navigation, put into the port of St Lucar, on the coaſt of Spain, in order to refit the veſſel. At that place he was perſuaded, by certain merchants, that it would be more for the intereſt of all concerned, to diſpoſe of the cargo there, even at an undervalue, than to proceed to the place of his deſtination, which he would not probably reach before Lent would have been over, and the ſalmon ſpoiled, beſides, by too long keeping. The cargo being ſold accordingly, he received his full freight out of the price, which was conſiderably under that expected from the market of Venice.

Richardſon and Company, who ſued thoſe merchants and the ſhipmaſter for damages*, brought an action likewiſe on the policy, which commenced before the High Admiral Court. In a proceſs of reduction of the Admiral's ſentence, the inſured

Pleaded: The obligation of the policy is to ſecure the inſured againſt "perils of the ſea, arreſts, reſtraints, and detainments of all "kings, princes, or people, of what nation, condition, or quality "ſoever, barratry of the maſter or mariners, and all the other perils, "loſſes, or misfortunes that have or ſhall come to the hurt, de"triment, or damage of ſaid goods, or any part thereof, during "this adventure,—until the ſaid ſhip with ſaid goods ſhall arrive in "the port or harbour of Venice, and the ſame be there ſafely land"ed."

Now, in fact, *a loſs and misfortune have come* to this cargo. It is a loſs, ultimately at leaſt, reſulting from *perils of the ſea*. And it has

* *Vide ſupra*, page 198.

proceeded more immediately from *arreſt, reſtraint, or detainment*, if not of kings or princes, yet of people whoſe *nation, condition, or quality* is not excepted. Nor is the particular motive or manner of detainment of any conſequence, Pond *verſus* King; King's Bench, Hilary, 21ſt George II. In fine, the loſs has been occaſioned too by the *barratry of the maſter*. "Barratry, in a marine ſenſe, "is when the maſter of a ſhip defrauds the owners or inſurers, whe-"ther by carrying the ſhip a different courſe to their orders, or by "ſinking her, deſerting her, or embezzling the cargo;" Poſtlethwaite Dict. Or in the words of Lord Hardwicke, "a breach of the con-"tract as maſter of the ſhip is barratry." Hil. 16th G. II.; Strange Rep. See alſo Raymond's Reports, vol. 2. p. 1350.; Strange, vol. 1. p. 581.; Molloy. Caſes in Chan. Mich. 29. Car. II. In the preſent caſe, by a total departure from the line of his inſtructions, the ſhip-maſter has violated his contract as ſuch, and defrauded the owners, who are thus ſubjected to great loſs; while he himſelf, though he accompliſhed but the half of his voyage, has been rewarded with the whole of his freight.

Anſwered: The only loſs which aroſe here from perils of the ſea, that of part of the ſalmon thrown overboard, the inſurers are willing to repair; for the going into the harbour of St Lucar was of itſelf no loſs; nor did any other conſequence follow from it than a ſcheme of trade concerted for the benefit of the owners, which is ſo ſtrangely compared to detention by kings, princes, or people. As to barratry, it is a criminal act, and cannot exiſt without a fraudulent deſign. Stamma *verſus* Brown; Strange's Reports, p. 1173; whereas here nothing in the conduct of the ſhipmaſter betrays the want of *bona fides*.

An argument was likewiſe ſtated relative to the common exception in policies, *of corn, fiſh, fruit, &c. from all but general average*, which however the Court ſeemed not to think material in the cauſe.

The Lords found, "That the underwriters were not liable for any "loſs that may have ariſen from the ſale of the ſalmon at St Lucar."

Lord Ordinary, *Elliock.* Act. *Mackintoſh, Wight.* Alt. *Lord Advocate.*
Clerk, *Home.*

S.

N° CXCI.

N° CXCI. *December* 24. 1784.

ROBERT DUNDAS,

AGAINST

ALEXANDER ALISON.

ARRESTMENT—*uſed in the hands of the owner of an eſtate under judicial ſale, competent to attach the money due to the agent employed in bringing that proceſs.*

JOHN IRVING was employed by the purſuer as agent in a proceſs of ranking and ſale of the eſtate of David Blair, another perſon was named factor under the ſequeſtration, and a third appointed common agent in the ranking.

Dundas and Aliſon were both creditors of Irving. In order to attach the debt contained in Irving's account, Mr Aliſon laid arreſtments in the hands of Mr Blair, the proprietor of the eſtate, and likewiſe in thoſe of the common agent. Afterwards, Mr Dundas, for the ſame purpoſe, uſed an arreſtment againſt the factor under the ſequeſtration, and obtained an aſſignation from the common debtor. A competition thus enſued between theſe two creditors, Mr Aliſon claiming preference from his prior arreſtments, while Mr Dundas contended, that they were inept, not having been directed againſt the proper parties; but that his arreſtment, as well as his aſſignation, was effectual, a judicial factor being veſted with more ample powers than an ordinary factor or commiſſioner.

The caſe was reported to the Court, who conſidered the proprietor of the eſtate under ſale as the debtor to the agent, and conſequently that the arreſtment in his hands was the only effectual one. It was obſerved too, that no diſtinction could be made between the caſe of a common, and that of a judicial factor.

The Lords therefore preferred Mr Aliſon to the ſum *in medio*.

Reporter, Lord *Braxfield*.
For Aliſon, *Corbet*.
For Dundas, *Solicitor-General*.
Clerk, *Orme*.

S.

N° CXCII.

N° CXCII. *December* 24. 1784.

DANIEL ANDERSON,

AGAINST

Meſſrs YOUNG and TROTTER.

FACULTY.—*A Diſpoſition in favour of one perſon, under reſervation to another, of a power to burden and diſpone;—conſiſtent in law.*

KATHARINE INNES purchaſed an heritable ſubject from William Dowie. The diſpoſition, however, was taken in favour of a third party, "David Hill in truſt, and for behoof of Katharine Innes;" and under this proviſo: "Reſerving power to the ſaid Katharine Innes her-"ſelf, without the conſent of her ſaid truſtee, to *burden*, ſell, diſ-"pone, or give away the whole or any part of the ſubject diſponed, "for onerous cauſes."

After the truſt conveyance was completed by infeftment, Katharine Innes, without the concurrence of her truſtee, did accordingly burden the ſubject, by granting to Anderſon, for an onerous cauſe, an heritable ſecurity over it, containing a precept of ſeiſin; on which he too was infeft.

Poſterior to this deed, Katharine Innes, together with the truſtee, executed another ſimilar ſecurity, in favour of Young and Trotter; who having taken an infeftment upon it, objected to that of Anderſon as premature and invalid, not having proceeded from the truſtee, who was ſtill undiveſted of the property. For Anderſon it was

Pleaded: Katharine Innes was proprietreſs of the ſubject, which ſhe held by her truſtee. If ſhe had incurred forfeiture for high treaſon, it would have comprehended this as well as her other property. For it has been found, in the caſes of Lord Lovat, and of Lord Pitſligo, Faculty Collection, 9th March 1756, that when a true or ſubſtantial right, and one that is purely nominal, ſubſiſt together relative to the ſame ſubject, it is the former which is affected by forfeiture. "In fact, there was a faculty in Katharine Innes, amounting to the full powers of property. It makes no difference whether this faculty be contained in a deed flowing from another, or reſerved in one granted by the party himſelf. In either caſe, the feudal right ſtands in the perſon of another; but ſtill the infeftment of that other muſt be conſtrued as an infeftment for behoof of the perſon in whom the faculty is created or reſerved, if it appear on the face of the records, that it is merely a truſt in the nominal diſponee. Here it was expreſſ-

ly

ly declared, that David Hill's infeftment was for behoof of Katharine Innes, and that ſhe was to have right to burden, ſell, or diſpoſe of the ſubjects. His infeftment is, therefore, in the ſound conſtruction of law, her infeftment." And that this doctrine does not infringe upon feudal principles, appears from Dict. of Deciſ. *voce* Faculty. Nay, in the late caſe of Lord Lauderdale *contra* Lord Eglintoun *, it was found, that a right of patronage, though ſtill nominally in the perſon of one of the claimants, might, nevertheleſs, be exerciſed by the other, as being veſted with the true or ſubſtantial title.

Anſwered: No doubt Katharine Innes is proprietreſs. Hill is her truſtee, and, were ſhe to incur forfeiture, the ſubject in queſtion would go along with her other property. But to ſuppoſe his infeftment to be on that account the ſame with hers, is to contradict one of the leaſt doubtful rules of our law, which has been exemplified in the immemorial uſage of denuding truſtees. Some rights, it is true, are nominal, and others ſubſtantial; yet ſure that is not a reaſon why a feudal right, when created in the perſon of a truſtee, ſhould paſs into that of the true proprietor, without any transference at all. It was by delivery of a ſubject, that the preſent truſtee was veſted with his right; and without re-delivery he cannot be diveſted. And as to the faculty reſerved from the original conveyance to him, it ſeems a ſingular argument, that this could render his infeftment equal to that of Katharine Innes: For it ſuppoſes the right to be both transferred to the truſtee, and reſerved from him at the ſame time. Certainly if reſerved, it was not included in his infeftment; and how then could that be equivalent to an infeftment taken by Katharine Innes herſelf? The judgment in the caſe of Lord Eglintoun, were it ſuch as is ſtated on the other ſide, would perhaps be the firſt of the kind; but it is the reverſe, having proceeded on the principle, that the nominal right ought to be previouſly annulled, and on the preſumption *poſt tantum temporis*, that it had been ſo in fact.

Obſerved on the Bench: There is not any doubt, that a power in favour of one perſon to burden an eſtate by an heritable ſecurity and precept of ſeiſin, may be tacked by the proprietor to a diſpoſition and infeftment in favour of another perſon. A common mandate or commiſſion, indeed, would be ſufficient for that purpoſe. Accordingly, it is uſual for great landed proprietors to appoint commiſſioners, who, without infeftment, enter vaſſals, grant charters, with precepts of ſeiſin, and ſell lands, all which acts are effectual in law.

The Court, therefore, ſuſtained the ſecurity obtained by Anderſon. And

The Lord Ordinary having preferred Young and Trotter claiming under the poſterior deed,

The Lords altered that interlocutor, and preferred Anderſon.

Lord Ordinary, *Kennet.* For Anderſon, *C. Hay.* Alt. *Wilſon.* Clerk, *Home.*

S.

* P. 124. *ſupra.*

N° CXCIII. *January* 19. 1785.

MARY MORRIS,

AGAINST

ROBERT WRIGHT.

SUCCESSION—*of moveables governed by the law of the place in which they were ſituated at the death of the proprietor.*

MARY MORRIS, as next of kin, according to the law of England, brought an action againſt Robert Wright, who, as executor by the law of Scotland, had intromitted with moveable effects ſituated in this country, but which had belonged to a perſon whoſe domicile was in England.

Thus the general queſtion again occurred, Whether ſucceſſion in moveables ſhould be regulated by the law of the place in which the deceaſed proprietor reſided, or by the law of the country in which the effects were ſituated at his death? The caſe was taken to report upon informations; and the Lords, without entering into a particular diſcuſſion of it, conſidered the point as now firmly eſtabliſhed, that the *lex loci* ought to be the rule. Accordingly, it was

Obſerved on the Bench: Such was the deciſion in the caſe of Duncan, in 1738, and in the competition for the moveable eſtate of Lord Daire, in 1744, as well as in the more recent caſes of Davidſon *contra* Elcherſon, and Maclean *contra* Maclean, in 1778. The determination in the caſe of Brown of Braid, collected by Lord Kames, the only one which could be adduced in ſupport of a contrary doctrine, was given by a thin Bench, upon a verbal report; and though not altered, becauſe never brought under review, was exploded by the moſt eminent lawyers of the time.

"The Lords unanimouſly ſuſtained the defences."

Lord Reporter, *Hailes*, Act. *Lord Advocate Campbell.* Alt. *Wight.* Clerk, *Orme.*

C.

N° CXCIV.

N° CXCIV. *January* 23. 1785.

JAMES AYTON,

AGAINST

JAMES BRUCE.

THIRLAGE.—*Whether the proprietor of a mill let in tack, taking the thirled lands into his natural poſſeſſion, is exempted from the thirlage.*

MR AYTON of Kippo let to James Bruce the mill and multures of theſe lands. Before the expiration, however, of this leaſe, he took a conſiderable part of the lands, which had formerly been poſſeſſed by tenants, into his own natural poſſeſſion, and withdrew the produce from the mill. James Bruce, the miller, in an action at Mr Ayton's inſtance, having claimed, on this account, a proportional abate ment of his rent, Mr Ayton

Pleaded: A poſſeſſor of lands cannot, for the ſole purpoſe of preſerving the multures in their former extent, be with-held from purſuing the mode of cultivation moſt beneficial to himſelf. Upon this principle it is, that either a tenant, or the proprietor on purchaſing the tack, may convert his lands into paſture, during the whole period of the multurer's poſſeſſion, though in this manner the expectation of the latter is entirely fruſtrated. Dictionary, *voce* Thirlage, 28th November 1755, Grant *contra* Milne; 20th February 1755, Slowan *contra* Hawthorn; 16th February 1769, Wilſon *contra* Chalmers. The preſent example ſeems preciſely of the ſame nature; a proprietor of a mill, in conſequence of the rule, *Quod res ſua nemini ſervit*, being always exempted from thirlage on account of lands in his own poſſeſſion, Erſkine, book 2. tit. 9. § 36. To the influence indeed of this maxim the parties here ſeem to have been attentive; the multures, as aſcertained by the leaſe, being thoſe only "of the *farm-meal* of the lands, and what was conſumed in the families of the "*tenants*."

Anſwered: It is true, that the tackſman of multures is entitled to no deduction on account of the thirled lands having been thrown into paſture. His rent is preſumed to have been fixed with a view to a change ſo uſual in huſbandry, while from the plentiful crops of grain, after the former mode of cultivation is reſumed, an ample compenſation is to be expected. But the landlord's taking his eſtate into his natural poſſeſſion is to be viewed in a very different light. Such an event could not be in the contemplation of the parties when the

the agreement was made. To exempt him on that account, from the multures which were payable by his tenants, would be extremely unjuſt. The clauſes in this leaſe, framed with a view to the actual ſtate of the lands, cannot import the multurer's acceſſion to a contract ſo unequal. The maxim, too, *Quod res ſua nemini ſervit*, is here entirely miſapplied; the multures due to the miller in conſequence of his leaſe, being his property, not that of the owner of the mill.

The Lords found the landlord liable in the ſame quantities of multure for the farms taken into his natural poſſeſſion, which the tenants formerly were bound to pay.

Lord Ordinary, *Swinton.* Act. *H. Erſkine.* Alt. *M'Cormick.*
Clerk, *Colquhoun.*

C.

N° CXCV. *January* 26. 1785.

WILLIAM HANNAY,

AGAINST

The CREDITORS of BARGALY.

RANKING AND SALE.—*A deduction from the price craved on account of an error in a plan referred to in advertiſing the ſale.*

IN the advertiſements publiſhing the judicial ſale of the lands of Bargaly, this eſtate was ſaid to conſiſt of 1710 acres, 146 of which were covered with wood; and a reference was made to a plan and meaſurement in the hands of the agent employed in the ſale, which was agreeable to that deſcription.

Mr Hannay, the purchaſer, offered to prove, that there was a deficiency of 96 acres, of which 46 were woodlands, the eſtate extending in all only to 1614 acres. He therefore claimed a proportional deduction from the price, and

Pleaded: Although the action *quanti minoris* is not ſuſtained in Scotland, where a purchaſer has been diſappointed in the *value* of the ſubject ſold, a different rule juſtly prevails, where, from its being either erroneouſly or fraudulently deſcribed, he has been deceived with regard to its *extent* or *quantity;* Erſkine, book 2. tit. 8. § 10.; 23d June 1757, Macneil *contra* Maclean, Dictionary, vol. 3. 14th Dec. 1764. Wilſon *contra* the Creditors of Auchinbreck. And this, though the bargain ſhould ſtill remain a beneficial one, the buyer being equally entitled

entitled to all the advantage he had reaſon to expect, as to be relieved from every loſs to which he has been expoſed, by receiving in this manner a falſe or inadequate notion of his purchaſe.

Anſwered: The value put on this eſtate, and the articles of roup, which alone formed the contract between the creditors and the purchaſer, were here fixed without regard to any meaſurement, this having been referred to merely as deſcriptive of the ſubject. An intention, therefore, cannot be preſumed, of making the dimenſions contained in it an eſſential condition of the bargain. Even in a voluntary ſale, the circumſtance above ſtated could not have juſtified an abatement of the price.

But in the caſe of lands ſold judicially, ſuch a claim is inadmiſſible. It has been there wiſely eſtabliſhed, on account of the ignorance of creditors as to the nature and extent of their debtor's eſtate, that no deduction ſhall be given, unleſs where a ſeparate value has been affixed to the right which is evicted or found to be defective. In every other caſe, the purchaſer's only remedy is, by renouncing the bargain altogether; Feb. 13. 1782, Lloyds *contra* the Apparent Heir of Paterſon.

Mr Hannay's petition, inſiſting for this deduction, was, with anſwers for the creditors, remitted to the Lord Ordinary in the action of ſale, who found no abatement due. Mr Hannay reclaimed; but his petition was refuſed without anſwers.

Lord Ordinary, *Hailes.* For the Creditors, *Rolland.* For the Petitioner, *H. Erſkine.* Clerk, *Orme.*

C.

N° CXCVI. *January* 26. 1785.

JAMES HILL,

AGAINST

GEORGE and JOHN BUCHANAN.

MOVEABLES.—SALE.—*Preſumed delivery.—Symbolical delivery.*

GEORGE and JOHN BUCHANAN having imported a cargo of tobacco, addreſſed the following letter, on 5th March 1783, to Wilſon and Brown, merchants: "Gentlemen, We make you an offer of *thirty* hogſheads of tobacco, imported from New York in the "Ruby, to be delivered to you or order, at Greenock, as it lies in "the *King's cellars*, and at the weight it paſſed at the King's ſcales,

" one of which *thirty* hogſheads is ſtill on board the ſhip, and ſhall " be delivered to you when landed, at the price 23½d. Sterling *per* lb. " you granting us bills for the ſame at ſix and ſeven months from " this date. We are, &c."

Of this offer Wilſon and Brown notified their acceptance by a counter miſſive of the ſame date, thus: " Gentlemen, We are fa- " voured with yours, of this date, making us an offer of your thirty " hogſheads of tobacco, *ex* Ruby, at 23½d. *per* lb. for our bills at ſix " months from this date, for the one half of the amount, and our " bills for the other half at ſeven months from this date. We ac- " cept of your offer: And we are," &c. On the ſame day, ſamples of the twenty-nine hogſheads were delivered.

Here it is to be remarked, that by " *King's cellars*," are not meant particular repoſitories appropriated for the ſervice of the revenue, but all places in which goods are kept under the joint cuſtody of the owner and of the officers of the cuſtoms. In this caſe the tobacco was lodged in Meſſrs Buchanan's own cellars.

Eight hogſheads were actually delivered to the order of Wilſon and Brown, and ſhipped on their account. But, on the day following, Wilſon and Brown became bankrupts; and then gave up to Meſſrs Buchanan the bill of lading that they had got on ſhipping theſe hogſheads, upon which the ſhipmaſter, to whom the bill was returned, granted a new one in favour of Meſſrs Buchanan. An irregularity, however, having been committed in re-ſhipping the hogſheads, they were a few days after re-landed by order of the Cuſtom-houſe officers, and placed in their former ſituation.

A ſequeſtration of Wilſon and Brown's effects having been awarded, under which Mr Hill was appointed factor, he inſtituted an action againſt Meſſrs Buchanan, for enforcing delivery of the tobacco; when the queſtion occurred, Whether in thoſe circumſtances the ſale had been ſo far completed as to transfer the property of the whole, or of any part of it to Wilſon and Brown?

Pleaded for the purſuer: The bargain of ſale was undoubtedly perfected by exchange of the miſſives, l. 35. § 5. *D. De contrab. empt.* Voet, *ad eund. tit.* § 24.; Erſkine, b. 3. tit. 3. By the ſame means, the transference of property was effected, even prior to any delivery; agreeably to the maxim eſtabliſhed in this matter by the law of England; Blackſt. Comment. b. 2. c. 30.; Aſſignees of Satterthwaite *verſus* Devonſhire; Burrow's Rep. v. 7. p. 931. Lewſley and Company *verſus* Cam and Company, December 1777. Here, however, delivery has not been wanting. That of *eight* hogſheads is not queſtioned; and with regard to the remainder, beſides the delivery of ſamples, which may juſtly be viewed as ſymbolical of the whole cargo, there is an implied tradition in the circumſtances of the caſe. When goods in the poſſeſſion of a third party are ſold, the ſeller thus transfers the right under which that poſſeſſion is held, and by conſtituting the third party cuſtodier for the purchaſer, virtually makes delivery of the goods, or transfers the cuſtody of them to the latter himſelf. Delivery is likewiſe implied of things placed out of the reach of the parties, ſuch as goods when at ſea. Lord Kames's Select. Deciſ. 13th June 1764; Buchanan and Cochrane *contra* Swan.

Now,

Now, in the preſent caſe, *twenty-one* hogſheads being lodged under the charge of the revenue-officers, were truly in the cuſtody of a third party; and ſuch too was the caſe of the hogſhead remaining on board; or perhaps it may be conſidered as in a ſituation inacceſſible to the parties. The property thus veſted in the bankrupts, is now attachable by their creditors.

Anſwered: It is eſtabliſhed, both in the Roman law and in ours, that though the bargain of ſale be completed, yet no transference of property can follow without delivery, which in this caſe was not made; the giving of ſamples having been intended merely to make known the reſpective qualities of the different parcels. Even the eight hogſheads, on the bill of lading being returned to the ſhip-maſter, were again placed in the poſſeſſion of their owners, along with all the reſt of the goods; that hogſhead included which was not brought aſhore till after the miſſives were exchanged. It was in Meſſrs Buchanan's own cellars that they were lodged; and the circumſtance of the revenue-officers taking charge of them there, cannot be imagined to have placed them in the cuſtody of a third party. There was then, in fact, no delivery; neither could it, with juſtice, have been required, ſince the cauſe contracted for, on the other hand, was precluded by the bankruptcy of the purchaſers. Not only, indeed, the price could not be paid, but even the ſtipulation of previouſly granting bills was not complied with. Since, then, no delivery has intervened, nor any title been created for claiming it, the property in queſtion ſtill remains with the purchaſers.

The cauſe was reported by the Lord Ordinary; when the Court ſeemed to approve of the defenders argument. At the ſame time, it was

Obſerved on the Bench: Even though delivery of moveables has been made in conſequence of a ſale, the ſeller, if by any lawful means the ſubjects ſold have come again into his poſſeſſion, is entitled to retain them until he is ſecured in the price. In heritage, if after the execution of a minute of ſale, the purchaſer ſhall become bankrupt, the ſeller is entitled to refuſe implement on his part.

The Lords aſſoilzied Meſſrs Buchanan.

Lord Reporter, *Gardenſton.* For the Factor, *Morthland.* Alt. *Wilſon.* Clerk, *Home.*

S.

N° CXCVII.

N° CXCVII. *February* 8. 1785.

JANET DUNCAN,

AGAINST

JOHN SLOSS.

BANKRUPT. *A proviſion to a wife*, by antenuptial contract, *ineffectual ſo far as exorbitant.*

BY an antenuptial contract of marriage, John Sloſs ſettled a large jointure on Janet Duncan his ſecond wife; for payment of which, after his death, ſhe ſued his heir, a child of the firſt marriage, on whoſe proviſions it encroached.

Pleaded for the defender: The jointure in queſtion is exorbitant, being greatly diſproportionate to the means of the granter; and therefore, *quoad* the exceſs beyond its rational or juſt amount, it is to be poſtponed to the claims, as well of his children by the prior marriage, as of his other creditors; Gosford; Stair, 19th January 1676, Stonefield *contra* Brown; Kilkerran, *voce* Bankrupt, 26th July 1744, Creditors of Sir James Campbell; Fac. Coll. 12th July 1758, Noble *contra* Dewar; Erſkine, p. 564. Fountainhall, 23d March 1683, Gartſhore *contra* Brand.

Anſwered: The authorities quoted relate to poſtnuptial contracts alone; for it has not yet been found, that proviſions to wives contracted for by antenuptial deeds, are not onerous debts in the fulleſt ſenſe.

The cauſe was reported by the Lord Ordinary, when

The Court reſtricted the jointure in queſtion to a rational extent, in the ſame manner as if it had been granted in a poſtnuptial contract.

Lord Reporter, *Gardenſton.* Act. *W. Craig.* Alt. *M. Roſs.* Clerk, *Home.*

S.

N° CXCVIII.

N° CXCVIII. *February* 16. 1785.

CREDITORS of PARK,

AGAINST

PATRICK MAXWELL.

PRESCRIPTION.—*The benefit of the act* 1695 *extends not to co-principals, though there be mutual ſtipulations of relief in their favour.*

ARTHUR PARK and WILLIAM ROWAND granted bond thus: "We "grant us to be juſtly addebted and owing, *equally betwixt us*, the "ſum of L. 67, &c.; which ſum we bind and oblige us, conjunctly "and ſeverally, to pay, &c. And we oblige us to bear juſt and equal "burden with each other in the premiſes, and to free, relieve, diſ-"burden, and ſkaithleſs keep one another, *hinc inde*, thereanent, *pro* "*rata parte*," &c. No diligence was done upon this bond within ſeven years from its date. Afterwards, however, an adjudication having been led for the whole debt againſt the ſubjects of Park, his other creditors

Objected: Park being, as to one half of the ſum, a cautioner, having in his favour a clauſe of relief in the bond, was, on the lapſe of ſeven years, "*eo ipſo* free of his caution," by virtue of the ſtatute 1695, and ſo far the adjudication is null. For there is not any diſtinction to be made betweén thoſe co-obligants whoſe intereſts and cautionary engagements are reciprocal, and ſuch as interpoſe themſelves as cautioners only; Dict. of Deciſ. vol. 2. p. 116; January 1728, Muir *contra* Ferguſon.

Anſwered: "The ſtatute is in favour of thoſe cautioners only who "have a total relief; not of co-principals who have a mutual relief; "whether it ariſes *ex lege*, or from ſtipulation; and therefore, two "perſons having granted bond, with a clauſe of mutual relief, one of "them having been charged for the whole by the creditor, was found "not to have the benefit of the ſtatute." Dict. of Deciſ. vol. 2. p. 116. 22d January 1708, Ballantine *contra* Muir.

The Lord Ordinary "repelled the objection;" and a reclaiming petition having been preferred to the Court by the objectors, it was refuſed without anſwers.

Lord Ordinary, *Kennet*. Act. *Sinclair*.

S.

N° CXCIX. *February* 22. 1785.

ELISABETH CHALMERS,

AGAINST

HELEN DOUGLAS.

PROOF.—*How far a witneſs may be required to particulariſe the grounds of his ſuſpicion relative to the matter at iſſue.*

IN an action of defamation and damages inſtituted before the Commiſſary-court, at the inſtance of Eliſabeth Chalmers againſt Helen Douglas, the defence of *compenſatio injuriarum* was pleaded on account of a ſcurrilous compoſition conveyed to the defender in a letter, which ſhe alledged had been ſent by the purſuer. Accordingly, a witneſs having been aſked, "Whether ſhe ſuſpected who wrote the letter, or "directed the cover?" depoſed, "That ſhe did ſuſpect a perſon in "her own mind; but as to having good cauſe for ſuch ſuſpicion, ſhe "could not ſay." The witneſs being then required to name the perſon to whom ſhe alluded, added, "That her ſuſpicions amounted to "nothing more than conjecture, and were nothing more than a mere "chimera of her own mind, which any perſon in her circumſtances "might form; but which ſhe did not think ſufficient, in her own "opinion, to juſtify her naming any perſon as the writer of the letter "or cover:" Upon which the Commiſſaries found, "That ſhe was "not obliged to give any more particular anſwer to the interrogatory." This judgment was brought under the review of the Court, when, in oppoſition to it, it was

Pleaded: It has been already decided, relatively to another witneſs in this cauſe, that ſuch an inquiry is to be permitted, though at the time it may have no apparent reference to the party whoſe agency it is intended to diſcloſe *. Nor does it make any eſſential difference, whether a witneſs ſhall mention a fact as creating belief, or as exciting ſuſpicion only, ſince thoſe various ſtates of mind may be produced in different perſons by the ſame circumſtances; and it is from theſe laſt, not their influence on the witneſs, that the opinion of a judge is to be formed. In the preſent caſe, the witneſs has avowed a ſuſpicion, which, together with the grounds of it, ought to be admitted into the ſcale of evidence.

Anſwered: The general inveſtigation alluded to, if at all to be indulged, ought ſurely to receive no unneceſſary latitude. Yet, were

* *Vid. ſupra*, p. 270.

even

even the oppoſite rule to be adopted, it would be prepoſterous to oblige a witneſs to name a perſon as the ſubject of a ſuſpicion which is declared to be founded on no circumſtances of probability whatever, but, on the contrary, to be a mere chimera.

Some of the Judges heſitated in giving their approbation to the deciſion mentioned above; and thought that the interrogatory under conſideration ought not to be put. The ground of this opinion ſeemed to be the following argument. Whether a witneſs depoſes to his knowledge, his belief, or his ſuſpicion, the conſideration of the Judge is more directed to the things themſelves which fell under his ſenſes, than to their influence on his underſtanding. In the preſent inſtance, a witneſs has teſtified that her ſuſpicion, being a mere chimera, had ariſen from no ſuch circumſtance; and thus has already given a full negative anſwer to the interrogatory.

The Lord Ordinary, however, having pronounced this interlocutor: "Remits the cauſe to the Commiſſaries with this inſtruction, That "they interrogate the witneſs in queſtion, as to whether or not ſhe "knows or *believes* that *the letter* or *cover* mentioned in the interro-"gatory was written by the private purſuers, any of their family, or "any other perſon immediately under their direction or influence;"

To that judgment the Court adhered, with this difference only, that inſtead of the phraſe, "knows or *believes*," that of "knows or *ſuſpects*" was ſubſtituted.

Lord Ordinary, *Alva.* Act. *Lord Advocate Campbell, Solicitor General Dundas, Maclaurin.*
Alt. *Croſbie, Buchan-Hepburn, Cullen, H. Erſkine.* Clerk, *Home.*

S.

N° CC. *February* 22. 1785.

ELISABETH CHALMERS,

AGAINST

HELEN DOUGLAS.

REPARATION.—*How far, in a civil action of damages, the maxim,* quod veritas convicii non excuſat, *is to be received?*

THIS being an action of damages, raiſed on the ground of the defender's having defamed the purſuer, the *veritas convicii* was urged in defence; and the Commiſſaries having found that plea to be irrelevant,

irrelevant, their ſentence was brought under review of the Court by bill of advocation.

Pleaded for the defender: The maxim, that *veritas convicii non excuſat a calumnia*, may indeed be received in public or penal proſecutions, but to civil actions for damages it is not applicable. In regard to the former, that breach of public peace which is the ſubject of judicial cogniſance, may be equally committed by reproach, whether true or falſe; though ſtill being a crime, the *animus injuriandi* is eſſential to it. l. 18. *D. De Injur.* Voet *ad eund tit.* § 9.; Mackenzie, tit. *Of Injuries;* Bankton, b. 1. tit. 10. § 31. 34.; Erſkine, b. 4. tit. 4. § 42. But ſurely, that damage to an individual character which civil actions are intended to repair or compenſate, cannot be produced by a faithful deſcription of the character itſelf; which however is implied in the *veritas convicii.* In ſuch a caſe, how abſurd would it be to require a palinode? Berlich. Concluſ. 62. § 23. This diſtinction is eſtabliſhed in the practice of the Commiſſary Court, as confirmed by the Supreme Court, and has been exemplified in many late caſes; ſuch as, thoſe of Ramſay *contra* Jarvie, of Fife, of Turner *contra* Watſon, and of Oliphant *contra* Macniel. By the law of England, where ſuch actions of damages are much more frequent than in this country, to which law Lord Sair, b. 1. tit. 9. § 4. has, on this head, referred, as worthy to be adopted, the point is invariably fixed. Blackſtone, b. 3. ch. 8. § 5.; b. 4. ch. 11. § 13.; 5 Rep. 125.; Hol. 253. 1.; Danv. 162.; 3 Salk.

Anſwered: That the above *maxim* of our law, which is confeſſedly admitted in criminal actions, ſhould be rejected in matters of civil juriſdiction, has not been proved by the authorities quoted, and does not ſeem warranted by reaſon. To recal from oblivion the ſtory of a perſon's failings, may be to involve him in misfortune and ruin; and could it then be ſaid that he had ſuſtained no damage? It is natural ſurely to queſtion the right of the aggreſſor to produce ſo great a calamity. When one's own ſafety, indeed, or the benefit of the public, requires it, ſuch an accuſation may be preferred with impunity; for there the immediate reſult is ſalutary, as the motive is right: But if the purpoſe be to hurt and injure, the only effect which proceeds from it is immoral and unlawful. And if damage has ariſen to one party from the unlawful acting of another, the law will award reparation; ſo that the diſtinction ſuppoſed ſeems to have no foundation in reaſon. As to the obſervation about palinodes, it has proceeded from the erroneous idea, that without this no other reparation could be obtained.

The Lord Ordinary refuſed the bill of advocation.

The general opinion of the Court ſeemed to be, That in a civil action the proof of *veritas convicii* may be admitted, in order to alleviate the award of damages.

The

The judgment on this point was the following:

" In reſpect the libel before the Commiſſaries contains a concluſion " for a palinode, and for a ſum of money in the name of damages to " the private proſecutor; find the defence offered of *veritas convicii* " competent in this cauſe to exculpate or alleviate.'

Afterwards, on adviſing a ſpecial *condeſcendence*, exhibited by the defender, which ſet forth facts alleged to have happened at the diſtance of about thirty years, the Court adopted the following rule, That, *in hoc ſtatu*, ſuch particulars only ſhould be admitted to probation as clearly involved guilt; it being deemed unjuſt, while no real criminality had been eſtabliſhed, to tarniſh the character of a party, by a proof of trifling or equivocal incidents, though theſe might eventually be received to fill up the meaſure of evidence. Some difficulty likewiſe occurred with reſpect to the ſpecification of the times aſſigned to the different acts charged againſt the purſuer.

The interlocutor of the Court was, to remit the cauſe to the Commiſſaries, with the inſtruction, to allow a proof of the direct and ſpecifical charges of an important nature, contained in the condeſcendence; limited however thus, that the evidence of each fact was to be confined to the particular year condeſcended on relative to it, and to a particular month in that year, with the addition of the two preceding, and the two ſubſequent months.

Lord Ordinary, *Braxfield.* Act. *Lord Advocate, et alii.* Alt. *Croſbie, et alii*
Clerk, *Home.*

S.

N° CCI. *February* 23. 1785.

DAVID SIBBALD,

AGAINST

HENRY-DAVID INGLIS.

PUBLIC OFFICER.—*How far the Clerk of the Bills is liable for the inſufficiency of a cautioner in a ſuſpenſion.*

SIBBALD purſued Mr Inglis, depute-clerk of the bills, in an action of damages, for his having received an inſolvent cautioner in a proceſs of ſuſpenſion of a charge at the purſuer's inſtance. The charger's agent did not appear in the bill-chamber on the occaſion; and

the clerk truſted to the repreſentation of the cautioner's ſufficiency, given by the doer for the ſuſpender, and aided, as he ſuppoſed, by the circumſtances of the ſmallneſs of the debt, it being under L. 7, and the cautioner's bearing the deſignation of "late *deacon* of his "trade in the town of Cupar."

Pleaded for the defender: The clerk of the bills muſt, in general, be ſuppoſed to know nothing perſonally of the cautioners offered to him; and from the diſtance of their reſidence, he will moſt frequently, too, be prevented from obtaining information concerning them. To interpret literally the act of ſederunt of 18th February 1686, ſo as to render him liable in damages, not only for receiving an inſufficient cautioner, but for refuſing one that eventually may be found to have been ſolvent would be in effect to ſubject him to the hazard of becoming reſponſible for the debt, in almoſt every inſtance in which the charger or his agent did not authoriſe him to accept the caution tendered. It cannot be the purpoſe of the law to reduce any public officer to ſo hard a ſituation; and accordingly it has been found, that if the clerk of the bills be free of any malverſation or culpable negligence, he is not anſwerable for the ſolvency of cautioners; Fac. Col. 1ſt March 1769, Stannars *contra* Inglis.

Anſwered: The uniform opinion of lawyers, and a train of deciſions of the Court, give countenance to a literal conſtruction of the enactment in queſtion; Stair, p. 775. *et ſeq.*; Bankton, vol. 1. p. 459.; Erſkine, p. 475.; Fountainhall, vol. 1. p. 2. Arreſtments; Stair, 2d Dec. 1680, Alſton *contra* Riddel; Dict. *voce* Public Officer. In the caſe of Stannars, the charger's agent had appeared and taken out a copy of the bill, without lodging any caveat againſt the receiving of the cautioner, which was conſidered as a tacit approbation of him; and it is admitted, that the ſame defence would have been valid in the preſent inſtance; but no degree of acquieſcence can here be ſhown.

The Lord Ordinary "aſſoilzied the defender."

The Court, however, "altered the Lord Ordinary's interlocutor; "and found the defender liable in damages and expences to the "purſuer."

The defender reclaimed; but his petition was refuſed without anſwers.

Lord Ordinary, *Stoneſield.* Act. *D. Williamſon.* Alt. *H. Erſkine.*
Clerk, *Menzies.*

S.

N° CCII.

N° CCII. *February* 23. 1785.

ALEXANDER TENANT, and others,

AGAINST

ALEXANDER JOHNSTON, and others.

MEMBER OF PARLIAMENT,—EXECUTION *of a Complaint, in virtue of the election-ſtatutes, not regulated by the formalities requiſite in other caſes.*

ALEXANDER TENANT, and others, complained to the Court of Seſſion, in terms of the ſtatutes 16th Geo. II. and 14th Geo. III. of certain proceedings in the election of magiſtrates for the burgh of Anſtruther-Eaſter.

One of the parties intereſted in this complaint, having his reſidence in England, the meſſenger employed by the complainers executed it againſt him at the market-croſs of Edinburgh, and pier and ſhore of Leith.

By way of preliminary defence, therefore, the reſpondents

Pleaded: Judicial citation is performed either by perſonal intimation to the party, or by leaving a copy of the ſummons, or other libel, at his dwelling-houſe. When neither of theſe methods, on account of the ſituation of the defender, can be practiſed, a warrant muſt be obtained from the Court of Seſſion, who, in virtue of their prætorian juriſdiction, authoriſe a ſpecial form of ſummons, adapted to the circumſtances of the caſe. As the meſſenger, in this inſtance, was not ſo warranted to depart from the general practice, the preſent complaint muſt fall to the ground, becauſe the whole parties intereſted in its diſcuſſion have not been regularly brought into the field.

Anſwered for the complainers: The remedy of abuſes committed at elections has no affinity to that inſtituted at common law for the redreſs of wrongs of a pecuniary nature. The matters complained of, the extent of the redreſs, the period within which the complaint is to be entered, with the form in which it is to be preſented and diſcuſſed, as regulated by the ſeveral ſtatutes made in that behalf, are eſſentially different. In all thoſe enactments, however, the form of executing complaints is no where aſcertained. The perſon to whom this buſineſs is entruſted, is thus left to his own diſcretion, which could not be here more properly exerciſed, than in adopting that proceeding, which, in the practice of the common law, would have been proper in the ſame circumſtances.

Obſerved

Obſerved on the Bench: The preferring of the complaint being alone ſufficient for interrupting the ſtatutory preſcription of four months, the reſpondents could derive no other advantage from the ſuſtaining of this objection, than to put the complainers to the trouble of a new citation. But the execution already uſed ſeems abundantly formal.

"The Lords repelled the objection."

For the Complainers, *Croſbie.* Alt. *Wight, J. Anſtruther, junior.*

C.

N° CCIII. *February* 23. 1785.

ALEXANDER TENANT and WILLIAM GRAY,

AGAINST

ALEXANDER JOHNSTON, and others.

BURGH-ROYAL.—*Qualifications of a Bailie.—Non-reſidence.*

IN the burgh of Anſtruther-Eaſter, the three bailies, who are the chief magiſtrates, preſent to the burgeſſes annually a liſt of nine perſons, out of which number are choſen the bailies for the enſuing year; and theſe, in their turn, elect the other office-bearers of the burgh.

In a complaint exhibited in the Court of Seſſion, Alexander Tenant and William Gray contended, That one of the perſons put in this liſt, in the year 1784, being reſident in England, the whole election was void and ineffectual.

For the complainers it was

Pleaded: As is is neceſſary that the perſons elected into the office of bailie ſhall be reſident in the burgh, this is no leſs eſſential to the nomination of ſuch as are put in the liſt out of which that magiſtrate is to be choſen, the right of the electors being equally infringed, by preſenting perſons altogether unqualified, as by abridging the number of thoſe from among whom the choice is to be made. Indeed, by multiplying that abuſe, ſo as only to leave three of the preſentees eligible, the perſons already in office, who may be included in the liſt, might enſure to themſelves for ever the government of the burgh. In this manner the election of the bailies being vacated, the nomination of the office-bearers choſen by them becomes, conſequently, ineffectual.

Anſwered: It would not follow, becauſe the bailies muſt reſide within the burgh, that thoſe perſons are altogether ineligible, who are not reſident at the moment of their election, nothing being farther requiſite

ſite to validate their appointment, than that they ſhould, during their office, have their abode in the town. If therefore the exception here urged could not have prevented the election of non-reſidents, it aſſuredly cannot have the leaſt influence on the choice of thoſe who were preferred to them, and to whom the objection is not applicable. In fact, however, this circumſtance is not rigidly attended to, either in this or in almoſt any other burgh in Scotland.

The Lords conſidered reſidence as an indiſpenſable qualification, if not departed from by inveterate uſage; and they reduced the election *in totum*.

Act. *Croſbie.* Alt. *Wight, J. Anſtruther junior.* Clerk, *Menzies.*

C.

N° CCIV. *February* 23. 1785.

ALEXANDER GORDON,

AGAINST

The OFFICERS of STATE.

TEIND.—*In a valuation of teinds, an allowance given to the landlord on account of his furniſhing marl to his tenants.*

IN an action for valuing the teinds of his eſtate, Mr Gordon proved, that he was obliged, without any price, to furniſh his tenants with marl for the uſe of their lands; and that the increaſe of rent, on account of that ſtipulation, would be moderately eſtimated at 20 *per cent:* He therefore claimed a deduction to that extent.

The Lords diſtinguiſhed this caſe from thoſe in which an abatement had been refuſed on account of ſea-ware, or other manure, purchaſed by the tenants for meliorating their farms; Kilkerran, Feuers of Dalkeith, 2d March 1757, Hay of Lawfield *contra* the Duke of Roxburgh. There, it was obſerved, the advantages of which the tenants had availed themſelves, and by means of which they were enabled to pay an advanced rent, were in their nature permanent; whereas, here the ſource of improvement was temporary and uncertain. The increaſe of rent, too, did not ariſe from an expence incurred by the tenants, but from the proprietor's obligation to perform certain articles not uſually incumbent on him.

The Lords found the purſuer entitled to the deduction craved.

Act. *Corbet.*

C.

N° CCV. *February* 25. 1785.

JAMES RUTHERFORD,

AGAINST

ELISABETH ANDERSON.

INNOVATION.—*Whether the acceptance of a new real ſecurity, without renunciation, innovates the former one.*

JOHN MASON granted an heritable bond to James Anderſon, on which he took infeftment. Afterwards Rutherford likewiſe obtained from Maſon an heritable ſecurity over the ſame ſubject. James Anderſon died, and was ſucceeded by Eliſabeth Anderſon, who delivered up to Maſon her predeceſſor's bond, though not accompanied by a diſcharge or renunciation, being herſelf in a ſtate of apparency; and in return received a new bond by Maſon in her own favour, upon which infeftment followed. She afterwards recovered the poſſeſſion of the old bond, and likewiſe of the infeftment, which had not been in the cuſtody of Maſon. In a competition of Maſon's creditors, Rutherford claimed a preference before Eliſabeth Anderſon, on this ground, that the heritable right granted to her predeceſſor, which was prior to his own, had been innovated and done away by the ſecurity obtained by herſelf, and which was poſterior; ſo that this queſtion occurred, Whether, by ſubſtituting the one ſecurity for the other, but without a renunciation, an extinction of it had been effected.

Pleaded for Rutherford: By accepting the latter bond, Anderſon directly relinquiſhed and renounced the preceding ſecurity. In other words, this obligation was changed into the other by *novation; l.* 1. *pr. D. De Novat;* Stair, b. 1. tit. 18. § 8.; Erſkine, b. 3. tit. 4. § 22.; Select Deciſ. 14th February 1752, Duke of Norfolk.

Anſwered: The feudal right conſtituted by the prior bond and infeftment ſtill ſubſiſted, notwithſtanding the mere delivery of the bond to the debtor. It could not be extinguiſhed otherwiſe than by a proper diſcharge and renunciation, which was not given, nor could proceed from an apparent heir. Of courſe, the right might have been adjudged at the inſtance of any creditor of James Anderſon, or it might have been taken up by any ſupervening heir.

The Lord Ordinary "found, That the former debt was innovated; "and therefore preferred Mr Rutherford." But

The Lords altered that interlocutor, found that innovation had not taken place, and preferred Eliſabeth Anderſon.

Lord Ordinary, *Hailes.* For Rutherford, *Nairne.* Alt. *Buchan-Hepburn.*
Clerk, *Colquhoun.*

S.

CCVI.

N° CCVI. *March* 8. 1785.

ANDREW BLANE,

AGAINST

DAVID MORISON, and others.

HYPOTHEC—*Of a landlord—In the effects of ſubtackſmen,—How far extinguiſhed by payments to the principal leſſee.*

DAVID MORISON and others poſſeſſed the eſtate of Kerſe under Ronald Chalmers, the tenant, who had powers to ſubſet; and to him for many years they paid their rents, without any challenge from the landlord.

Their tack-duties for the year 1782, which were due at Martinmas, had in this manner been paid to the principal tackſman before 23d January 1783, at which period, Mr Blane, the factor on this eſtate, applied to the ſheriff-depute for a ſequeſtration of their crop and ſtocking, in ſecurity and payment of the hypothec-rent due to the landlord.

The queſtion thence ariſing having been brought into the Court of Seſſion by bill of advocation, Mr Blane, the factor,

Pleaded: The fruits or yearly produce of a farm, as well as the effects which have been brought into it, are viewed by the law of Scotland, as the property of the landlord, and unalienable, until the ſtipulated rent has been paid to him. He is accordingly provided with an action, while theſe are extant, for converting them into money for his payment, to the excluſion of every other perſon; and when they are no longer to be found, he is warranted to purſue the intromitters, for their value; Kames's Law-Tracts, 4. p. 151, 152.; Erſkine, b. 2. tit. 6. § 56.; Voet, *in quibus cauſis pignus tacite contrahitur;* Dict. *voce* Hypothec; Durie, 5th March 1630; Fowler *contra* Cant.

Nor are ſubtenants exempted from this general rule. Where, indeed, a landlord has ſigned as conſenter to the ſubleaſe, or where he has accepted from the ſubtackſman the rents ſpecified in it, there might be ſome reaſon for holding effectual againſt him the performance of an agreement he has ſo explicitly recogniſed: And to ſuch caſes any authorities which can be quoted for the ſubtenants are alone applicable. But a mere liberty to ſubſet, whether particularly expreſſed, or implied from the endurance of the principal leaſe, cannot be attended with the ſame conſequences. A landlord is thereby debarred from inſiſting on the perſonal reſidence of the principal tackſman; but in every other reſpect, the rights belonging to him, and his preference in virtue of the hypothec, remain in their former extent.

Hence

Hence it is, that a ſubtackſman is not *perſonally* bound to the landlord, which would be a neceſſary conſequence of ſuppoſing an implied agreement between them; Stair, b. 2. tit. 9. § 2. In the form of removing too, preſcribed by the act of ſederunt, the ſummoning of ſubtenants is not required, 14th December 1756, § 3.; from which it is plain, that a regular payment of rent to the principal tackſman will not ſecure them from an irritancy incurred by him, *ob non ſolutum canonem*. So alſo, where a farm has been divided among many ſubtackſmen, the landlord may attach the fruits of any one field for the tack-duties of the whole, Fount. 1700, Salton *contra* Club; a determination, which ſeems quite deciſive of the preſent queſtion, ſince no payment by a ſubtenant, of the rent correſponding to his poſſeſſion, ought to be more effectual than what is made in virtue of legal diligence to the landlord himſelf.

Anſwered for the ſubtenants: The right of hypothec may be limited, not only by expreſs covenant, but alſo in conſequence of the implied will of the landlord; Erſkine, b. 2. tit. 6. § 63.; Dict. *voce* Hypothec, Edgar; Nov. and Dec. 1724, Brown *contra* Sir John Sinclair. Such a reſtriction then muſt unavoidably take place, when by giving authority to ſubſet, the landlord has delegated the ſame powers to the tenant for recovery of the ſubtack-duties, as belong to himſelf with regard to the rents ſtipulated in the principal leaſe. After the ſubtenants have duly delivered their rents to the perſon impowered by him, he ſurely cannot be heard to inſiſt, that they ſhall be compelled to make a ſecond payment to himſelf. No inſtance accordingly can be given, in which, for rents due by a tenant having ſpecial powers to ſubſet, the effects of a ſubtackſman who had paid his promiſed tack-duties, have been found attachable by the landlord. And the opinions of our lawyers ſtrongly ſupport the contrary doctrine; Erſkine, b. 2. tit. 6. § 34.; Bankton, b. 2. tit. 9. § 17.; Stair, 5th February 1667, Lady Traquair *contra* Houſton.

The ſituation of ſubtenants would otherwiſe be intolerably grievous. The crops reared by each, ſo long as they were unconſumed, would remain impignorated for the rents of the whole farm, however extenſive. And the ſubtenant might afterwards be ſued as an intromitter, thus being rendered *ſubſidiarie* liable, during forty years, not only for the principal tenant, but alſo for the other ſubtackſman, againſt whom, at the ſame time, he is not, by any form of law hitherto known, provided with the means of ſecuring his relief. Nor could any hardſhip accrue to landlords from a more equitable conſtruction of the agreement in queſtion. For although payments by ſubtenants, when made without any previous interpellation on the part of the landlord, were to be ſuſtained, it would not follow that his legal preference was altogether derelinquiſhed, or that, by anticipating the payment of the ſubrents, by ſtipulating eluſory tack-duties, or by any other ſimilar device, it could be unreaſonably diminiſhed.

It was farther contended for ſeveral of the ſubtenants, that the ſums paid by them had been delivered by the principal tackſman to the factor; from which they derived an additional argument, why the

the landlord's hypothec with reſpect to them ſhould be conſidered as diſcharged.

The Lord Ordinary's interlocutor was in theſe terms:

"Finds, That the heritor's real right and ſecurity of hypothec for "his principal tack-duty or rent, ſo long as it continued in force, did "extend to, and affect the whole crop and ſtocking, upon all and "every part of the land let by him in the principal tack thereof, "whether ſuch crop or ſtocking belonged to the principal tackſman "himſelf, or to the defenders and others his ſubtenants, and was "neither excluded nor reſtricted in its effect by the principal tack's "bearing a power or licence to the tackſman to ſubſet the ſaid lands: "Finds, That it was not neceſſary, for preſerving the ſaid heritor's "hypothec, that he ſhould, either before or after the term, interpel "the defenders, whom he had not accepted of as his tenants, from "paying their ſubrents to the principal tackſman under whom they "poſſeſſed; but that the ſaid ſubtenants, when making ſuch payments, "did it at the hazard of their crop and ſtocking being ſtill affected "by the heritor's legal right of hypothec, in caſe the principal tackſ-"man ſhould fail to pay up to him the whole of the principal tack-"duty, for ſecurity of which that hypothec was ſtill ſubſiſting; and "that the defenders allegation, that the ſums of money paid by "them, to account of the ſubrents ſoon after Martinmas 1782, were "paid over by him to the purſuer, in part of the principal tack-duty "due at the ſaid term, is neither inſtructed, nor relevant for ſup-"porting their objection to the ſequeſtration: And therefore finds, "That as the purſuer obtained a ſequeſtration of the whole crop and "ſtocking on the lands contained in the principal tack, within leſs "than three months after the ſaid term of Martinmas 1782, when the "principal tack-duty in queſtion fell due, the intermediate payments "made by the defenders to the principal tackſman, or diſcharges of "the ſubrents granted by him to them, could be no bar to the ſaid "ſequeſtration; and that the ſequeſtration muſt ſtill ſubſiſt accord-"ingly," &c.

The ſubtenants having brought the queſtion under review of the Court, by a reclaiming petition, which was followed with anſwers, a hearing was appointed. Memorials were afterwards given in for the parties, upon adviſing which the Lords altered the Lord Ordinary's judgment; thus ſuſtaining the objections urged in behalf of the ſubtenants, to the awarding of the ſequeſtration.

There was a great diverſity of opinion among the Judges; and it was obſerved on the Bench, that this deciſion was not to be viewed as determining in general, that the landlord's hypothec, when ſubſetting was not prohibited, could be excluded in conſequence of payments made, after the legal term, to the principal leſſee.—The ſpecial power to ſubſet, which here occurred, and the long and uninterrupt-

ed uſe of payment by the ſubtenants, ſeemed to have conſiderable weight with ſome of the Judges.

Lord Ordinary, *Eſkgrove.* Act. *Lord Advocate, Geo. Fergusſon.*
Alt. *Blair, Corbet, W. Miller.* Clerk, *Home.*

C.

N° CCVII. *March* 9. 1785.

JOHN YOUNG,

AGAINST

JAMES DUNN.

SALE,—*Conditional.*—Lex Commiſſoria.

IRRITANCY,—*Penal.*

JOHN YOUNG ſold to James Dunn a houſe belonging to him, at the price of L. 2500, which was to be paid or ſecured in a certain manner, at the term of Lammas following; otherwiſe the agreement to become void, and Mr Dunn to be conſidered as the leſſee of the houſe, at the yearly rent of L. 225.

Mr Dunn not having implemented the firſt part of this bargain, Mr Young, ſometime after the term of Lammas, proceeded, without any premonition, to diſpoſe of the houſe to a third party. He then brought an action of removing, in which Mr Dunn

Pleaded in defence: The ſale of the houſe was not a conditional one, to be valid only upon payment of the price within the ſtipulated period; it was truly a finiſhed ſale, with a clauſe entitling the ſeller to reſolve the bargain, in caſe the price was not duly paid or ſecured according to the agreement. It thus reſolved into an example of the *Lex Commiſſoria*, in which the ſeller, for putting an end to the contract, muſt premoniſh the buyer; it being contrary to reaſon, that he ſhould be allowed to hold the other party bound, after the obligation on his part has become ineffectual; l. 4. § 4. D. *De Leg. Commiſſ.*

The alternative condition, too, of the extravagant rent to be paid on the ſale becoming void, muſt be an inſuperable bar to the preſent action. In penal irritancies, the intention of him who exacts a ſtipulation of that ſort, is not to derive, from the inadvertency or embarraſſment of his neighbour, an unreaſonable benefit to himſelf, but merely to enſure performance of the contract; and to this intention courts of

of equity have imparted a proper effect, by determining, that upon a fulfilment of the bargain within a reaſonable time, or before a decreet of irritancy can be extracted, the other party may be releaſed from the penal conſequences of his delay; Erſkine, b. 2 tit. 5. § 25. Dict. *voce* Irritancy. Neither, for affording this equitable relief, is it neceſſary that ſuch a method of compelling performance of the contract has been uſed, by directly ſtipulating a ſum of money in name of penalty. The deciſion muſt be the ſame, where the penalty annexed to a ſale is conceived in the form of a rent infinitely greater than the ſeller could have expected, either from the purchaſer or any other perſon.

Anſwered for the purſuer: In proper ſales, where the agreed price is preciſely equal to the value of the ſubject ſold, the doctrine of penal irritancies has never been admitted; Stair, book 1. tit. 13. § 14.; Bank. b. 1. tit. 9. § 29. 32.; Dict. *voce* Irritancy. There, conditions of the nature here occurring are to be obſerved in their literal ſenſe; nor can a court of equity interpoſe, to give any greater latitude than has been preciſely ſtipulated. But there is here, in truth, no penalty, which from equitable notions can be modified or retrenched. By the expreſs agreement of the parties, which no court can convert into another diametrically oppoſite, it has been provided, that in the event which has really happened, the poſſeſſion ſhould be aſcribed, not to the contract of ſale, but to a leaſe at a fixed rent. As, therefore, it was no longer in the power of the ſeller to inſiſt for implement of the prior bargain, it would be unjuſt to enforce againſt him the counterpart of that obligation. For the ſame reaſon, the equity of the rule adopted in the *Lex Commiſſoria*, is not applicable to the preſent caſe.

Several of the Judges expreſſed their opinion, That unleſs for the ſecondary bargain of leaſe, Mr Young could not, without ſome premonition, have departed from the ſale. Others, however, thought, that in that contract the condition here interpoſed was to be ſtrictly obſerved.

"The Lords repelled the defences, and decerned in the removing."

Lord Reporter, *Monboddo*. Act. *Blair*. Alt. *H. Erſkine*.
Clerk, *Home*.

C.

N° CCVIII.

N° CCVIII. *June* 16. 1785.

JANET BUCHANAN,

AGAINST

FRANCIS MACNAB.

REPARATION.—*A young woman, debauched by a gentleman in whose house she lived, found entitled to damages.*

JANET BUCHANAN, while residing in the house of Mr Macnab in the quality of humble companion to his sister, was by him got with child. Before this event, as he acknowledged, her character had been unblemished; nor did she yield to his embraces without a considerable degree of solicitation.

In an action of damages, brought by her before the Commissaries of Edinburgh, Janet Buchanan

Pleaded: A man having debauched an unmarried woman, is obliged either to marry her, or to provide her with a suitable dowry; Exod. xxi. 7. *et seqq.*; *Perezius, ad Cod. lib.* 9. *tit.* 13. § 3.; *Mathæus de Crim. lib.* 48. *tit.* 3. Viewing an intercourse of this sort as a breach merely of moral duty, the woman is not free from blame; but it is the man who is the aggressor, and who is indeed to be considered as principally guilty. To him the event is not immediately productive of any patrimonial damage; whilst the woman, who suffers the irretrievable loss of reputation, is thereby at once precluded from obtaining in future an honest livelihood. To compel the author of these evils to save the woman from poverty or prostitution, to place both parties on a more equal footing, and by these means to check in its origin a connection so hurtful to society, are objects equally of justice and of public utility.

The protection due to the pursuer from the person by whom she was seduced, contrasted with the many solicitations which he used, tends strongly to confirm the present claim. If, in pecuniary rights of the most trivial concern, breach of trust is ever accompanied with an obligation to restitution, it never can be imagined that our law has here neglected to provide the means of redress. Nor are precedents wanting, in which the Court of Session has interposed in similar circumstances; Kilkerran, 1st December 1749, Linning *contra* Hamilton.

Answered: A court of equity has power to interpret, or to give a just effect to legal contracts. But from an act illicit in its nature, even though preceded by an express agreement, no action can arise in favour

vour of the offending parties. Surely then an obligation will not, in the preſent caſe, be implied in equity, to which, if grounded on a ſpecial paction, a court of equity would refuſe its ſanction. Dict. *voce Pactum illicitum.*

Nor indeed could ſuch an exerciſe of equitable juriſdiction be defended on principles either of juſtice or true policy. On the part of the man, it is true, the firſt advances are made to an intercourſe of this kind; but is not the woman equally culpable, who does not inſtantly diſcourage thoſe advances? The conſequences, too, of an illicit amour, far from countenancing a claim like the preſent, ought to have a quite different tendency; ſince it is from theſe alone, in a very high degree, that female chaſtity derives its ſafety.

A demand of the nature of that here urged, if at all admiſſible, is to be reſtricted to the caſe of a *ſtuprum fraudulentum*, where undue arts have been joined to ſeduction, or where ſome expectation of marriage has been given; or at leaſt where it has been reaſonably founded on the equal rank of the parties. Such, in a ſtriking degree, were the circumſtances in the caſe of Linning *contra* Hamilton, in which it is, at the ſame time, to be remarked, the Judges were far from being unanimous; Kames's Remark. Deciſ. Nor ought thoſe regulations which are to be found in the Moſaical law, and in the latter conſtitutions of the Roman Emperors, to be obſerved by the modern nations of Europe, where the ſituation of women is ſo very different.

The Commiſſaries found no damages due; but the queſtion having been brought into the Court of Seſſion by bill of advocation, the Lords, chiefly moved by the ſituation of the purſuer when ſeduced by Mr Macnab, reverſed their judgment.

"The Lords remitted the cauſe to the Commiſſaries, with an in-
"ſtruction to find damages due."

Lord Ordinary, *Swinton.* Act. *Wight, Rolland, J. Boſwell.* Alt. *Lord Advocate, H. Erſkine, Maconochie.* Clerk, *Menzies.*

C.

N° CCIX. *June* 16. 1785.

The CREDITORS of KILDONAN,

AGAINST

DOUGLAS, HERON, and COMPANY.

RIGHT IN SECURITY.—*Whether a diſponee in ſecurity is entitled to charge the expence of a factor in levying the rents.*

JAMES CHALMERS of Kildonan diſponed his lands to Douglas, Heron, and Company, in ſecurity of certain ſums owing by him. The diſpoſition contained the uſual clauſe, authoriſing the creditors to enter into poſſeſſion, and to name ſtewarts and factors for recovering the rents; declaring, that they ſhould be liable only for their intromiſſions, deducing all expences in levying the ſaid rents, and not for omiſſions or negligence of any kind.

Douglas, Heron, and Company having aſſumed poſſeſſion of the lands, and afterwards accounting with the poſtponed creditors for their intromiſſions, inſiſted for deduction of ſeveral ſums as the ſalary of a factor, or as diſburſed by him in the execution of his office, ſuch as the expence of intimating his appointment to the tenants, and enquiring into the ſituation of the farms.

Obſerved on the Bench: An heritable creditor entering into poſſeſſion, is to be viewed as a proprietor; and it would therefore be equally unreaſonable, in this caſe, to allow a charge in name of factor-fee, or for any trouble undertaken in that capacity, as it would have been to award the like ſums to the creditor himſelf when uſing, in perſon, thoſe meaſures he thinks neceſſary for his ſecurity.

The Lord Ordinary had ſuſtained theſe articles; but that judgment was altered by the Court, after adviſing a reclaiming petition for the poſtponed creditors, with anſwers for Douglas, Heron, and Company.

Lord Ordinary *Juſtice-Clerk*. For the Poſtponed Creditors, *G. Ferguſſon*.
For Douglas, Heron, and Company, *Maconochie*. Clerk, *Menzies*.

C.

N° CCX.

N° CCX. *June* 17. 1785.

JOHN ROBERTSON,

AGAINST

GEORGE ROBERTSON.

TESTAMENT.—*A ſettlement chiefly relating to moveables, effectual to convey heritable property, where* diſpoſitive *words are uſed.*

THE now deceaſed father of the parties executed a deed, in which, after premiſing his intention to diſpoſe of *all* his means and eſtate, and that John Robertſon, his eldeſt ſon, had formerly received an ample ſhare of his effects, he *diſponed, aſſigned, and conveyed*, to George Robertſon, his youngeſt ſon, " all the ſtocking upon his farms, with " *all other* goods, gear, *debts*, or ſums of money preſently pertaining " to him, or that ſhould happen to pertain to him at the time of his " death, with all bills, *bonds*, *decreets*, and every other kind of goods, " debts, ſubjects, and effects that belonged to him, or ſhould appear " to belong to him at his deceaſe."

At the period of executing this ſettlement, the deceaſed was creditor by a perſonal bond, upon which an adjudication afterwards followed; a circumſtance from which John Robertſon, the eldeſt ſon, contended, that the debt contained in it had become heritable, and therefore could not be tranſmitted in conſequence of a ſettlement which appeared to relate only to moveable funds.

Obſerved on the Bench: Heritable effects, ſuch as a debt ſecured by adjudication, will not be carried by a deed conceived in a *teſtamentary* form. Where, however, proper *diſpoſitive* words have been uſed, the only queſtion is concerning the intention of the deceaſed, which, in this caſe, is ſufficiently evident.

The Lords affirmed the judgment of the Lord Ordinary, which found, " That George Robertſon had right to the ſums in queſtion, " in virtue of the ſettlement made by his father."

Lord Ordinary, *Kennet*. For John Robertſon, *Robertſon*. For George Robertſon, *E. Armſtrong*. Clerk, *Robertſon*.

C.

N° CCXI.

N° CCXI. *June* 18. 1785.

The CORPORATION of WEAVERS in the Town of Cupar.

AGAINST

DAVID WILSON, and others.

BURGH ROYAL.—*Act* 24. *Geo. II. cap.* 31. *does not infringe the authority of corporation members over their own members.*

THE corporation of weavers in the burgh of Cupar, enacted, That, no freeman ſhould undertake to teach his art to apprentices who did not become members of the corporation.

David Wilſon and others having tranſgreſſed this regulation, were fined by the Bailies. In a ſuſpenſion, they urged the act 24th of his late Majeſty, by which it is, *inter alia*, provided, "That every weaver "or manufacturer of linen, flaxen, or hempen cloth, ſhall, and "may, and is hereby authoriſed to exerciſe the ſaid reſpective trades "within any city, town, corporation, burgh, or place in Scotland, "without any let or hindrance, from any perſon or perſons whatever, "and without being chargeable or charged with payment of any "entry-money or other duty whatever, for or in reſpect of their "following ſuch trade or buſineſs."

The Lord Ordinary repelled this reaſon of ſuſpenſion, being of opinion that the enactment above recited, permitting the exerciſe of the trade of weaving in towns to unfreemen, or thoſe who were not burgeſſes, did not preclude this corporation from enacting by-laws for the government of its own members.

The ſuſpenders reclaimed; but the Lords refuſed the petition without anſwers.

Lord Ordinary, *Kennet.*
Clerk, *Orme.*

For the Petitioners, *Blair.*

C.

N° CCXII.

N° CCXII. *June* 21. 1785.

JEAN LISK, and her *Curator ad litem*,

AGAINST

Her HUSBAND and his CREDITORS.

FRAUD.—*A woman induced by fraud to marry an insolvent person, not intitled to withdraw her effects from the* jus mariti *of her husband.*

JEAN LISK, who enjoyed from a former husband a terce yielding annually L. 600, was courted by a gentleman pretending to be possessed of a free landed estate of L. 240 *per annum*. By the marriage-articles, the whole effects belonging to the parties were to accrue to the survivor, Mrs Lisk, at the same time having it in her power, in case of her predecease, "to burden the subjects in communion, "*etiam in articulo mortis*, to the extent of what she brought with her."

Instead of being in a condition to fulfil the above mentioned agreement, Mrs Lisk's husband, at the time of the marriage, was irretrievably bankrupt. A sequestration of his effects soon took place; when she brought an action against him, and the trustee for his creditors for having it found, that he had no right to the rents of her terce-lands. It could not well be said, that the marriage-contract contained an express exclusion of the *jus mariti*; but Mrs Lisk offered to prove its having been her expectation, and that of her friends, that she was to enjoy her estate independent of her husband; from which, joined to the deception practised with regard to his situation in point of fortune, she

Pleaded: The matrimonial engagement, so far as relates to the union of the married persons, is indeed indissoluble from considerations of a pecuniary nature. In its effects, however, on the estates and property of the parties, it is to be viewed as an ordinary contract, and to be regulated by those principles of justice which influence other agreements. Where these have been brought about by fraud, it is the province of courts of equity to give relief, by annulling them; or where a mere voidance would not afford an adequate reparation, by imparting that effect to the contract which the injured party was induced to expect from it; Dict. *voce* Fraud; Principles of Equity, b. 1. c. 1. sect. 1. 2.; Bacon's Abridgement, *voce* Fraud.

The pursuer in the present case could receive no advantage from annulling the marriage-articles, the marital rights being alone sufficient

cient to transfer to her husband the whole produce of her estate. But as the marriage itself was occasioned by gross imposition on his part, and as it arose from the same cause, that the marriage-settlement did not secure to her, as he gave her reason to expect, the unlimited administration of her own funds, he ought, as the only remaining method of redress, to be excluded from every participation of them.

Neither can the intervention of creditors create any difference in the present argument. A husband's interest in his wife's estate, being in its nature strictly personal, the same exceptions which would have been available against him, must be equally competent against those who, by the operation of legal diligence, are brought into this place. In questions of fraud, especially, their situation never can be better than his; because, by taking advantage of his wrong, they become accessories to it, and obliged, in the same manner with their principal, to indemnify the suffering party; Kames's Rem. Decis. Sir Archibald Grant *contra* the Creditors of Tilliefour.

Answered: It is the union of the married pair, which, in the understanding of law, is the essential object of the nuptial connection. The advantages of wealth, as well as those of rank or superior qualities of mind, are only accidental appendages to that union; nor can the disappointment, or even the deception of either of the parties, with regard to them, detract from its validity, or alter in any respect its legal consequences; *Reg. Maj.* book 2. c. 16.; *Quoniam Atachiamenta*, c. 20. 21. 22.; Balf. Pract. p. 111.; Stair, book 1. 4. 9.; Erskine, b. 1. tit. 6. § 13.

Neither does the marriage-contract give any support to the present action. Had an exclusion of the *jus mariti* been actually agreed on, the fraud of the husband executing the deed in the terms here used, might have been redressed in equity, as, without a rigid adherence to words, stipulations may be construed or enforced according to their true meaning; but it belongs to the legislative authority alone to substitute, instead of the covenant of parties, another essentially different, or to supply such defects in the execution of contracts, as render them in peculiar contingencies ineffectual for the purposes for which they may have been designed. The pursuer's situation is analogous to that of a creditor who has lent his money to a bankrupt on a personal bond, when, by requiring landed security, he might have recovered the debt; or who, from his having relied on an informal document, is not allowed to compete with other creditors: Cases in which the wrong committed by the debtor admits of no remedy.

Another question likewise occurred, but did not then receive a determination, How far the pursuer, if not enabled to withdraw her estate altogether, was, nevertheless, in the circumstances of the case, intitled to a reasonable aliment out of it during the subsistence of the marriage?

The

The Lords, by a great majority, found, " That the creditors were " not barred from affecting the rents of the terce-lands belonging to " the purſuer, and falling under her huſband's *jus mariti*."

Lord Reporter, *Ankerville.*
Alt. *Lord Advocate Campbell, Abercromby.*

Act. *Wight. H. Erſkine.*
Clerk, *Orme.*

C.

N° CCXIII. *June* 23. 1785.

HUGH M'ILWRAITH,

AGAINST

GILBERT M'MIKIN.

WRIT.—*Signing by initials, no witneſſes being preſent, invalid, where the party is ignorant of writing.*

HUGH M'ILWRAITH claimed the contents of a promiſſory note, in conſequence of a gratuitous indorſation from the creditor deceaſed, which was only ſigned with the initials of her name. No witneſſes were ſaid to have been preſent when the indorſation was executed; and the deceaſed could not read writing.

But the voucher was found in the poſſeſſion of the indorſee. And it was farther alleged, that in the very few tranſactions in which the defunct was concerned, ſhe had adhibited her ſubſcription in the form here uſed, and that ſhe had not only informed ſeveral perſons of her purpoſe of beſtowing this debt on the claimant, but had alſo acquainted them with her having carried her deſign into execution.

Gilbert M'Mikin, however, the executor of the deceaſed, called in queſtion the validity of this indorſation, when Hugh M'Ilwraith

Pleaded: It has not been held eſſential for authenticating writings, that the ſubſcriber's name ſhould appear at full length. Neither has it been conſidered as abſolutely neceſſary in deeds where witneſſes are not required to atteſt full ſubſcriptions, that theſe ſhould be called to every ſignature by initials. It is ſufficient, either that the ſubſcriber was in the practice of ſigning in this manner, or that the genuineſs of the ſubſcription appear from the circumſtances of the caſe; 16th November 1667, Culteraes *contra* Chapman; 26th February 1662, Brown; 25th June 1724, Paterſon; Kilkerran, *voce* Writ, N° 89. Without this, not only the ſubſcription by initials, of perſons verſant in writing, which are very frequent, would become ineffectual; but the

the great bulk of the common people, who without any knowledge of writing, carry on a conſiderable trade, by means of ſubſcriptions of this kind, would in a great meaſure be excluded from commerce.

A method, it is true, has been deviſed by ſtatute, for the execution of deeds by ſuch as are ignorant of writing. But were a proviſion of that nature entirely to exclude the uſe of every other or leſs formal document, it would follow, that a bill of exchange, or other mercantile voucher, ſhould not be ſuſtained, unleſs completed in terms of the act 1681, before witneſſes, ſubſcribing and deſigned. In both caſes, theſe general rules have been tempered in practice, nor a more rigid mode of verifying writings required than is compatible with the circumſtances of ſociety. The indorſation, therefore, in queſtion, authenticated by the uſual ſubſcription of the party, and confirmed by ſuch unequivocal acts of homologation, muſt be quite unexceptionable.

Anſwered: A diſtinction is here to be made between perſons converſant in writing, and capable of ſubſcribing their names at full length, and thoſe who, though they have been taught to frame, in an irregular manner, the initial letters of their name, are yet ſo wholly illiterate as to be unable to know the import or effect of writings ſet before them. Subſcription by initials, in the caſe of the former, when it is proved to be their uſual method of ſigning, is held to be ſufficient. The peculiarities of a current hand are there ſo far diſtinguiſhable as to afford the means of diſcovering forgeries, *ex comparatione literarum;* while the ſignature, if truly adhibited, is equally with a complete ſubſcription expreſſive of the party's deliberate intention to become bound, or to execute the deed ſigned by him. But in the caſe of the latter, the object of requiring the ſubcription of the party as an indiſpenſable ſolemnity, is in no degree attained by the obſervance of the ſame form. Not only is the awkward imitation of letters by thoſe who cannot write, deſtitute of that uniformity by which genuine ſubſcriptions may be diſtinguiſhed from ſuch as are falſe; but from the ſignature, though actually adhibited, there ariſes no certainty of the deed's being of the nature and effect which the ſubſcriber intended or underſtood it to be.

It was with a view to the dangers to which perſons of this laſt deſcription were expoſed, when parties to written contracts, that the legiſlature introduced the forms preſcribed by the ſtatutes 1540, c. 117. 1579, c. 80. Nor is it of importance, in the preſent diſpute, that, by way of exception from theſe ſalutary regulations, the ſubſcription by initials, even of thoſe who cannot write, has been ſuſtained, eſpecially in mercantile tranſactions, when, together with the uniform cuſtom of ſigning in that manner, it can be ſhown by witneſſes preſent, and before whom the nature of the buſineſs was explained, that the initials were really affixed by the party. For beyond this the deciſions have never gone; nor could a greater latitude be permitted, without opening a door to innumerable frauds. Hence the preſent indorſation can be intitled to no regard. The inſtances in which the deceaſed had occaſion

caſion to ſubſcribe were too rare to eſtabliſh an uniform cuſtom of ſignature. The ſubſcription, though genuine, could afford no concluſive proof of a purpoſe to transfer the debt, gratuitouſly, to the claimant. The evidence, therefore, here offered, by extraneous witneſſes, of ſuch an intention, is equally inadmiſſible as if no indorſation whatever had appeared.

The Lord Ordinary ſuſtained the objection to the indorſation, " in " reſpect it was acknowledged by Hugh M'Ilwraith, that he could not " prove that the deceaſed did actually adhibit her ſubſcription by ini- " tials to the bill in queſtion."

A reclaiming petition for Hugh M'Ilwraith was appointed to be anſwered, rather for the purpoſe of fixing the point by a ſolemn deciſion, than from any difficulty in the caſe.

And after adviſing the reclaiming petition, with anſwers for Gilbert M'Mikin, the Lord Ordinary's judgment was affirmed, and expences awarded.

Lord Ordinary, *Braxfield.* Act. *Maconochie.* Alt. *Hay.* Clerk, *Home.*
C.

N° CCXIV. *June* 24. 1785.

JANET HEPBURN,

AGAINST

JAMES HEPBURN.

GENERAL DISCHARGE.—*Effect of a diſcharge of a child's legitim, and* others whatſoever, *that ſhe could claim or crave* by *or* through *her father's deceaſe.*

JANET HEPBURN and her huſband, in their marriage-contract, accepted of the tocher given by her father " in full contentation " and ſatisfaction to them of all bairns part of gear, portion natural, " legitim, or *others whatſoever*, that the ſaid Janet Hepburn or her " ſaid huſband, for his intereſt, could aſk, claim, or crave, *by* and " *through* her father's deceaſe."

Her father having died inteſtate, Janet Hepburn inſiſted, after her huſband's death, againſt James Hepburn her brother, for a proportional ſhare of her father's executry.

The defender oppoſed the diſcharge above recited, as excluſive of his claim; and

Pleaded: Our municipal law has not rejected pactions *ſuper hereditate viventis*. Nothing is more uſual, in the marriage-ſettlements of children, than renunciations of their rights of ſucceſſion, to the effect of tranſmitting thoſe ſubjects to the other relations, which would have deſcended to the renouncer. Nor, in this inſtance, can the intention of parties admit of any reaſonable doubt. The purſuer had no claim againſt her father in virtue of any contract of marriage or bond of proviſion; ſo that her only *other* intereſt in his moveable eſtate, that of the legitim having been expreſsly renounced, was the ſhare due to her of his executry or dead's part. To this alone ſhe could be entitled *through her father's deceaſe;* an expreſſion, with the utmoſt propriety, applicable to what might fall to her by way of ſucceſſion, in oppoſition to her legal and conventional claims. The general ſcope of the deciſions has been agreeable to this reaſoning. A diſcharge of all that a child can claim or crave *from* her father, does not exclude her from the dead's part, which is not, like the legitim, a veſted right, but merely an expectancy of ſucceſſion. But where ſhe has farther renounced all ſhe can claim *through* her father's deceaſe, ſhe is thereby cut out of every demand of that ſort. Erſkine, book 3. tit. 9. § 23.; Bank. book 3. tit. 8. § 20.; Fount. 4th December 1694, Foubaſter.

Anſwered: The claims ariſing to children againſt the repreſentatives of their father are either legal or conventional; the former conſiſting of the legitim, and the latter of the obligations due by him, and preſtable at his deceaſe, either in virtue of his marriage-contract, or by bonds of proviſion, or from any other cauſe. In regard to theſe, the children have a proper *jus crediti*. And their father accordingly has an obvious intereſt to obtain a diſcharge, that his eſtate, diſburdened of ſuch incumbrances, may lie open to his unlimited diſpoſal.

Of a nature altogether ſeparate from theſe, though likewiſe taking effect at the father's death, is the childrens privilege of inheriting that part of his moveable funds, which alone, by our cuſtoms, he is at liberty to ſettle, in caſe of children unforisfamiliated, by a teſtamentary deed. Here the children have no claim againſt their father or his repreſentatives. They are themſelves the repreſentatives; and a diſcharge from them muſt be quite ſuperfluous, becauſe this part of his effects muſt of neceſſity deſcend to them under every limitation he is pleaſed to impoſe.

Since therefore it is an eſtabliſhed rule, that a general clauſe ſubjoined to a diſcharge, ſhall not comprehend particulars of a nature different from thoſe ſpecially mentioned, the one occurring in the deed in queſtion, which expreſsly refers to the purſuer's legal claims againſt her father, cannot be conſtrued, by implication, into a renunciation of her right of ſucceeding to him. A tranſaction of the latter ſort, tho' not prohibited by the uſage of Scotland, muſt be expreſſed in terms clearly denoting the father's purpoſe of excluding his child from any ſhare of his inheritance; as, for example, by taking a renunciation of

of what ſhe might *ſucceed* to at her father's death, or of her father's *executry*. This diſtinction accordingly has been recogniſed by an uniform train of deciſions for many years paſt. Andrew Pringle *contra* Aliſon Pringle, 1741; Home, 22d November 1743, Anderſon *contra* Anderſon; 22d February 1749, Martin *contra* Agnew, 16th June 1768, Sinclair *contra* Sinclair.

Several circumſtances were ſtated for each party, as tending to ſupport their reſpective pleas; but the caſe was determined on the general import of the clauſe, which the Lords conſidered as perfectly aſcertained by the more recent deciſions.

After adviſing a reclaiming petition for the defender, with anſwers for the purſuer, the Court adhered to the judgment of the Lord Ordinary, which found, " That the clauſe contained in the purſuer's " contract of marriage did not preclude her from claiming a legal " ſhare of the moveable effects left by her deceaſed father."

Lord Ordinary, *Kennet*. Act. *M. Roſs*. Alt. *Wight, Rolland*.
Clerk, *Menzies*.

C.

N° CCXV. *June* 25. 1785.

JOHN MENZIES,

AGAINST

ELISABETH-MACKENZIE MENZIES.

TAILZIE.—*Powers of an heir of entail, not being the laſt ſubſtitute, to impoſe new fetters.*

THE eſtate of Culdares was limited by a deed of entail executed in the year 1697, which contained the uſual prohibitory, irritant, and reſolutive clauſes.

The deviſe was, to *James Menzies* and his heirs-male; whom failing, to *John Stewart* of Cardneys and his heirs-male; whom failing to *George Stewart*, the brother of the former, and his heirs-male; and theſe all failing, to the *entailer's heirs-male*. After this followed a deſtination in favour of the entailer's heirs whatſoever, and their aſſignees.

James Menzies, and the late Commiſſioner Menzies his only ſon, who had no male iſſue, agreed to execute a ſupplementary entail; whereby, in addition to the ſubſtitutes ſpecified in the former deed, thei own heirs, including, in the firſt place, the Commiſſioner's daughter, were called to the ſucceſſion, before the heirs whatſoever of the original entailer.

After

After the death of Commiſſioner Menzies, who ſurvived his father, John Stewart of Cardneys, now Menzies of Culdares, made up his titles by a ſervice under the original entail. He afterwards brought an action againſt Eliſabeth-Mackenzie Menzies, the daughter of Commiſſioner Menzies, for ſetting aſide the additional ſettlement, which had been completed by charter and infeftment. In this manner the general queſtion occured, How far a perſon poſſeſſing an eſtate under a ſtrict entail, himſelf not being the laſt ſubſtitute, could make a ſuppletory entail, to take effect when the ſubſiſting one ſhould come to an end.

Pleaded for the defender: An heir of entail, unleſs where particular limitations occur, and theſe too guarded by the ſtatutory clauſes requiſite for creating a proper *jus crediti* in the after heirs, is as much an abſolute proprietor as the entailer himſelf. Erſkine, b. 3. tit. 8. § 29.; Kilkerran, 8th November 1744, Sinclair *contra* Sinclairs; Home, 27th January 1744, Gardener and Creditors of Dunipace *contra* Primroſe; 8th February 1758, Creditors of Humbie *contra* his Children; 27th February 1760, Earl of March *contra* Sir Thomas Kennedy; Creditors of Cromarty *contra* the Officers of State, in 1760 *.

If, therefore, where a direct infringement of the order of ſucceſſion is alone prohibited, the teſtator's purpoſe may be entirely fruſtrated by the heir's ſelling the lands, or by the contracting of debt, his power of giving complete efficacy to it, by the inſertion of additional prohibitions, ſurely cannot be ſuppoſed to be taken away. Or if being unreſtrained with regard to leaſes, he may, by theſe means, greatly reduce the value of the eſtate, for any length of time, he muſt *a fortiori*, enjoy the leſſer right of preventing any future dilapidation of that ſort. Nor is this reaſoning applicable only to deeds of entail in which ſome prohibitory, irritant, or reſolutive clauſe has been omitted. Even in thoſe of a more perfect kind, no reaſon can be given why ſuch new reſtrictions as are not inconſiſtent with the original ſettlement, but rather tend to enforce it, or to explain the teſtator's meaning, ought not to be equally effectual. To prolong an entail, it may be farther remarked, without impoſing any new conditions on the original ſubſtitutes, inſtead of counteracting the former ſettlement, ſeems moſt agreeable to its avowed object, of perpetuating the teſtator's name and family. It is true, that in this manner the laſt ſubſtitute will not have an opportunity to alter the ſucceſſion, or to diſpoſe of the eſtate; but that right is not ſecured to him by any particular proviſion, nor indeed derived from the will of the entailer, who certainly intended no preference in this reſpect to the perſon laſt called to his ſucceſſion. It ariſes ſolely from the operation of the law itſelf, which will not authoriſe a limitation on property longer than is neceſſary to render effectual the intereſt of the heirs of entail. It cannot, therefore, have the ſmalleſt influence in the preſent queſtion.

* By this deciſion, which is not to be found in any printed collection, it was determined, that where one of the heirs had forfeited an entailed eſtate for high treaſon, his debts, becauſe the remoter ſubſtitutes had no longer an intereſt in the limitations, were effectual againſt it.

Anſwered

Anſwered for the purſuer: The power of regulating the tranſmiſſion of property in ſucceſſion, and of thus controuling, in the perſons of the moſt remote heirs, the free adminiſtration of it, ariſes not from natural right, but from poſitive inſtitution, and by this, of conſequence, it muſt in all reſpects be governed. In Scotland, accordingly, it is the ſtatute 1685 which alone authoriſes proprietors effectually to limit the deſcent of their lands, and to impoſe fetters and reſtrictions, according to the rules therein preſcribed, on the perſons called by them to the ſucceſſion. Thoſe two rights, of nominating heirs, and of laying reſtraints on the perſons ſo named, are the counter parts of each other, and veſted by the ſtatute in one and the ſame perſon. It belongs not, therefore, to an heir of entail, who tranſmits nothing to his ſucceſſors which it was in his power to take away, to add one limitation to thoſe already eſtabliſhed.

This power indeed would be quite inconſiſtent with the purpoſes of the ſtatute. By impoſing ſome new condition, which the ſubſequent heir either cannot or will not implement, every heir in poſſeſſion might at once throw looſe the order of ſucceſſion formerly preſcribed. Not only the perſons called as heirs whatſoever might be in this manner excluded from the ſucceſſion by the firſt ſubſtitute, as well as the laſt, though ſuch an authority has been hitherto underſtood to ariſe only upon a total extinction of the heirs of entail; but even thoſe ſpecially called, and in whoſe behalf the limitations were impoſed, might, by this expedient, be deprived of their rights, though expreſsly warranted to them by the ſtatute.

Other conſequences of ſuch a power are not leſs ſtriking. By the force of repeated limitations, and by a continually increaſing ſeries of new ſubſtitutions of heirs, the free uſe and commerce of land would be altogether reſtrained. A ſale of entailed property or ſecurities in favour of creditors might be eſtabliſhed, to take effect upon the failure of the original ſubſtitutes. As every right capable of voluntary alienation muſt be attachable by legal diligence, an entailed eſtate might, in this way, be adjudged for the debts of every ſucceeding heir. Nay, after one of the heirs had committed treaſon, or any other crime inferring a confiſcation of landed property, the lands, inſtead of deſcending to the heirs whatſoever, would eſcheat to the Crown. From the contingent or eventual tenure of property which this would introduce, the moſt inextricable embarraſſments would enſue.

Neither, ſurely, is it of any importance, that ſettlements by entail are confined within the narroweſt limits of interpretation. In theſe, as in many other important deeds, where the uſe of particular forms or of technical expreſſions is required, a failure in *execution* is not leſs fatal than a total want of *intention*. Hence it is, that a mere prohibition to alter the ſucceſſion, though guarded by an irritancy, imports only in the contemplation of law, that the eſtate ſhall be inherited agreeably to the teſtator's injunctions, if not alienated, or burdened beyond its value by the ſucceſſive heirs. If to this has been added an effectual proviſion againſt the contracting of debt, the eſtate, if not ſold, will deſcend to the ſubſtitutes unincumbered with the debts of the anterior heirs. But from ſuch incomplete deeds no argument

can ariſe with regard to an entail perfected, like the preſent, with all the requiſite clauſes. Without the ſanction of an irritancy, every new limitation muſt here be altogether nugatory. Should an irritancy be interpoſed, its effect would be to innovate that rule of ſucceſſion, which the legiſlature has declared to be unalterable.

The purſuer farther contended, That the termination in favour of the entailer's heirs whatſoever, was of the nature of a clauſe of return, which could not be gratuitouſly diſappointed. That argument, however, ſeemed to be altogether diſregarded by the Court.

It was likewiſe urged for the defender, That James Menzies, the maker of the ſuppletory deed of entail, was not an heir of entail, but a diſponee, which depended on the conſtruction of the different writings relative to this eſtate.

The Lords found, "That an heir of entail, under the deed 1697, "had no power to make the ſupplementary entail in queſtion; but "that James Menzies was not an heir of entail under the deed 1697, "but a diſponee, and therefore had powers to make ſuch an entail."

Lord Reporter, *Monboddo.* Act. *Lord Advocate Campbell, Mackintoſh, Wight.*
Alt. *Blair, H. Erſkine, N. Fergusſon.* Clerk, *Menzies.*

C.

N° CCXVI. *June* 25. 1785.

JOHN MURRAY, and others,

AGAINST

COLIN MACFARQUAR, and others.

DAMAGE AND INTEREST.—*Literary property. Act 8th of Queen Anne.*

MACFARQUHAR, and other editors of a Dictionary, intitled, Encyclopedia Britannica, having, under the article relative to Scotland, inſerted a hiſtory of that kingdom, at the æra of the Reformation, which they had extracted, in a great meaſure, verbatim, from two treatiſes publiſhed by Dr Gilbert Stuart, though it was ſo far abridged as not to exceed in extent a half of the original works; Murray, and others, who had purchaſed the copy-right of thoſe publications, ſued the above-mentioned editors in an action founded on the act 8th of Queen Anne, for having the printing and ſale of the article ſtopped, for the ſtatutory penalties, and for damages.

Pleaded

Pleaded for the defenders: By the terms of the ſtatute in queſtion, which, from its penal tendency, demands a ſtrict interpretation, the excluſive property thereby created is confined to complete or entire compoſitions, and does by no means extend to partial extracts or paſſages taken from authors. Otherwiſe, not a ſingle ſentence, it is evident, nor a line, of a book, could be quoted without as real an infringement of the ſtatutory property, as if ever ſo large a portion of the work had been extracted. This conſequence ſhews how unreaſonable ſuch a conſtruction would be, and how much exploded by daily uſage in the publication of magazines, reviews, annual regiſters, and other periodical miſcellanies, which could not exiſt without the unreſtrained freedom of borrowing ſelect paſſages from all ſuch treatiſes as excite curioſity. If, indeed, in this matter, fraud were to be committed, and even partial extracts made, in order to interfere with the profits of the literary proprietor, the ſanction of the ſtatute might be rightly applied. To that caſe alone, except when entire performances have been extracted, all the actions on this ſtatute which have been ſuſtained in this Court, or by the Engliſh Judges, will be found to refer. But in a caſe ſimilar to the preſent, action was denied in the equity court of Exchequer in England, 25th July 1783, Longman and Broderick *verſus* Fielding. In this inſtance, neither have the entire works in queſtion been publiſhed by the defenders, nor have they, in following out the plan of their undertaking, uſed any means to deprive the purſuers of the benefit of their property.

Anſwered: If the ſimple device of publiſhing a treatiſe in ſeparate parts were ſufficient for eluding the protection afforded by the enactment under conſideration, the argument no doubt of the defenders would be good, and the ſtatute nugatory. But that is a ſuppoſition which, though evidently inſeparable from their plea, is in itſelf highly unreaſonable, and is contradicted by every authority on the ſubject. In many caſes ſimilar to the preſent, action under this ſtatute has been ſuſtained; ſuch as, Skinner and Taylor *contra* the Editors of the Town and Country Almanack, in December 1776; and in England, Macklin *verſus* Richardſon and Urquhart; and Maſon *verſus* Murray. But in none of thoſe inſtances was there a greater infringement of literary property than that which occurs in the preſent caſe.

The cauſe was reported by the Lord Ordinary, when

The Court "repelled the defences."

And to this judgment they adhered, on adviſing a reclaiming petition and anſwers.

Reporter, Lord *Eſkgrove*.
Alt. *Solicitor-General, Wight*.

Act. *Lord Advocate, Blair*.
Clerk, *Home*.

S.

N° CCXVII.

N° CCXVII. *June* 28. 1785.

The CREDITORS of DAVID ELLIOT,

AGAINST

WILLIAM MORISON and Company.

PERICULUM.—*Inſurance,—How voidable by the bankruptcy of the underwriter.*

WILLIAM MORISON, and Company procured from David Elliot inſurance on three ſhips belonging to them.

Before the reſult of the voyage was known, but after one of the ſhips had arrived at its deſtined port, David Elliot became bankrupt, and Moriſon and Company obtained from other underwriters a ſecond inſurance of their property. Afterwards, upon the ſafe arrival of all the three ſhips, they were ſued for the premiums ſtipulated in the firſt inſurance, by the creditors of David Elliot, who

Pleaded: In the contract of inſurance, as in every other mutual agreement, the ſupervening inability of one of the parties may intitle the other to demand a liberation from his engagement. For effectuating this, however, the concurrence of the perſon unable to perform is neceſſary; or if that cannot be had, an action muſt be brought, in which his creditors, if it appear to them a profitable adventure, ſhall have an opportunity, after fulfilling his part of the contract, to inſiſt for reciprocal performance. And ſuch meaſures muſt be indiſpenſably requiſite in a caſe like the preſent, where the obligation undertaken by the inſurer having been in part implemented by the ſafe arrival of one of the veſſels before his bankruptcy, the ſtipulated premiums had become due to him in a correſponding proportion.

Were the inſurance-contract alone voidable at the will of one of the parties, that deviation from the ordinary rules muſt have been long ago fixed by innumerable precedents. The manner of indicating ſuch a purpoſe muſt have been preciſely defined, that he to whom this freedom is permitted, might not ſtill hold the other bound, while every obligation on his part has been completely diſſolved. Upon the bankruptcy of the inſured, before payment of the premium, it would follow that the underwriter ſhould reciprocally be allowed to recede from this contract. Nay, upon the inſolvency of the inſurer himſelf, his creditors ſhould be at liberty to ſhake themſelves looſe from an engagement which they are no longer in a capacity to enforce.

In

In the practice of England, it is evident an insurance cannot be annulled in so summary a manner. By 19th Geo. II. c 37. § 4. the assignees of a bankrupt-underwriter are authorised to make reinsurance, the peculiar situation of the parties being expressed in the policy; thus plainly intimating that the first insurance still remained obligatory. And by cap. 32. § 2. the insured are allowed to rank with the underwriter's other creditors for losses sustained after the bankruptcy. In the present case, therefore, where the insured made no attempt to obtain a dissolution of the bargain, and where, of course, they were intitled, in case of a loss, to draw a rateable proportion of the bankrupt-estate, they ought not to be permitted, on the fortunate issue of the voyage, to with-hold the sums which in the policies they became bound to pay.

Answered for the defenders: In other agreements, there is no injustice in allowing to the creditors of a bankrupt an opportunity of fulfilling the engagement of their debtor. The difference between performance at the time specified in the contract and at a subsequent period may be very unimportant, and admits of an adequate reparation in damages, while by retaining the thing to be given or performed on his part, the solvent person is sufficiently protected from loss. But in the contract of insurance, the smallest delay may be productive of consequences which are irremediable; as in the mean time the misfortune guarded against may have befallen the subject insured, after which, if known to the parties, no new insurance can be made. Hence, after the underwriter's bankruptcy, the insured are not obliged to suffer an hour to elapse, but may proceed instantly to reinsure, which at once puts an end to the former bargain.

The practice of foreign nations is agreeable to this reasoning; Ordinances of Hamburgh, tit. 18. p. 2; of Amsterdam, art. 25. In England, according to the opinion of some writers, even without any new policy, and though the adventure has been fortunate, the insured are intitled to a repetition of the premiums, which are there uniformly paid when the policy is subscribed; Magens, vol. 1. p. 94; Weskett, *voce* Insur. § 6. The statute, too, of the late King, which allows reinsurance to be made by the insured, in case of a bankruptcy, clearly shows this to be the sense of that nation; it being an established maxim there, That two valid insurances of the same interest in the same subject cannot subsist at one time. Neither is it of any consequence, that the creditors of an underwriter are permitted, by the statute quoted on the other side, to cover, by a new insurance, the hazard undertaken by him, which only proves the contract not to be *ipso facto* voided by his bankruptcy, and that it cannot be annulled either by the bankrupt or by his creditors; as that intitling the insured to rank for losses sustained after the bankruptcy, was solely meant to remove a peculiarity in the law of England, which allowed those creditors only to rank under a commission of bankruptcy, whose debts were fully due when the insolvency happened.

The Lord Ordinary ſuſtained the defences; to which judgement, after adviſing a reclaiming petition for the purſuers, with anſwers for the defenders, the Court, almoſt unanimouſly, adhered.

Lord Ordinary, *Eſkgrove.* Act. *A. Campbell.* Alt. *Blair.* Clerk, *Home.*

C.

N° CCXVIII. *June* 28. 1785.

CREDITORS of PARK,

AGAINST

PATRICK MAXWELL.

SERVICE AND CONFIRMATION—*Neceſſary to render valid a decree of Adjudication in favour of an executor.*

ARTHUR PARK was indebted in a ſum of money to Hugh Warden, whoſe general diſponee, *unconfirmed*, obtained decreet for the debt; and on that ground an adjudication was afterwards deduced. To this adjudication other creditors

Objected: Without previous confirmation the decree could not be valid; 26th November 1784, Lennox *contra* Grant: p. 283. *ſupra.* Of conſequence the diligence which followed upon it was likewiſe void.

Anſwered: If a debtor acknowledges the right of his creditor's ſucceſſor by granting to him a bond of corroboration, the neceſſity of confirmation will be ſuperſeded. The ſame conſequence ſhould ſeem to follow from his ſubmitting to the paſſing of a decree againſt him at the inſtance of the heir; and ſo the point has been explicitly determined; Lord Harcarſe, *voce* Compriſings, § 321.; March 1686, Children of Bangor *contra* Duke and Ducheſs of Hamilton.

The Lord Ordinary repelled the objection. But

The Court altered that judgement; and in reſpect of the want of confirmation, found the adjudication ineffectual.

Lord Ordinary, *Kennet.* Act. *Rolland.* Alt. *Blair, Morthland.* Clerk, *Home.*

S.

N° CCXIX. *July* 2. 1785.

Poor ALEXANDER LAMONT,

AGAINST

JOHNSTON, ARMSTRONG, and COMPANY.

CAPTIVE,—*Recompence due to a hoſtage, where the ranſom-contract has not taken effect.*

A Ship and cargo, the property of Johnſton, Armſtrong, and Company, having been captured by a French privateer, was ranſomed by the maſter, who delivered Alexander Lamont, the mate, as hoſtage.

This agreement, the ſums ſtipulated in it conſiderably exceeding the value of the prize, was inſtantly diſclaimed by the owners. And a ſale having afterwards taken place, under the authority of the judge-admiral, the proceeds were given up to the captors, who then releaſed Alexander Lamont the hoſtage, after he had been confined for two years and four months.

An action having been inſtituted by him for wages during his detention, and for the expences of his journey homewards, the owners

Pleaded in defence: The ranſom-contract having been for ſums beyond the value of the prize, was altogether unwarrantable and void. It was immediately rejected by the owners, and departed from as untenible by the captors themſelves; circumſtances in which this caſe materially differs from that of Darg *contra* Gordon, Feb. 25. 1784. The ſituation of all parties in this manner became the ſame as if ſuch an agreement had never taken place. The purſuer's detention, therefore, was not in the quality of ranſomer, but as a priſoner of war; and as the defenders were neither the authors of his confinement, nor benefited by it, they cannot be ſubjected to conſequences inſeparable from the purſuer's profeſſion.

It is farther an eſtabliſhed rule, in order to ſecure the attention and fidelity of mariners, that no wages are due to them where no freight is earned. Hence the lieutenant of a privateer, having been ſent away as prize-maſter of a ſhip which had been taken, and which he carried home in ſafety, was, on account of the ſubſequent capture of the privateer itſelf, denied every recompence for his ſervices; Douglas's Reports. For the ſame reaſon, the maſter and crew of the ſhip in queſtion never thought of demanding wages. Yet the purſuer's claim cannot be better founded than theirs; for though, by the intervention of the ranſom-contract, the latter attained their liberty ſooner than they otherwiſe

otherwiſe would have done, the condition of the former is in no reſpect worſe than if ſuch a ſtipulation had never exiſted.

Anſwered: In every lawful matter relating to the ſafety of a ſhip, its crew are bound, implicitly, to obey the perſon put over them by the owners. As to ranſoming, particularly, they have no title to diſpute the maſter's authority, or to examine its extent. In a queſtion, therefore, with them, it would be of no importance that he had made a bargain which the owners were not obliged to fulfil. For though, in ſuch a caſe, the obligation to pay to the captors the ſtipulated ſums might be ineffectual, the neceſſity of procuring the releaſe of the hoſtage would ſtill remain the ſame. Had the preſent ranſom been illegal and void, it would have been incumbent on the defenders, by a proper application to thoſe courts to which the captors were ſubject in queſtions of prize, to have effected his immediate diſmiſſion; and the loſs which proceeded from the neglect of a meaſure ſo obviouſly requiſite, muſt have fallen on thoſe who were the cauſe of it, not on the innocent ſufferer.

Nor is the other branch of the defenders argument better founded. The recompence due to the purſuer, it is true, is naturally proportioned to the hire he might have earned in his profeſſional capacity; but the right from which it is derived is in its nature altogether ſeparate and diſtinct. The latter, as acceſſory to the freight, could not be demanded until the voyage had been ſucceſsfully performed; whereas the former did not and could not exiſt till the voyage and every intereſt depending on it, had been finally determined. Here then the preſent caſe is quite diſſimilar to the one quoted on the other ſide. The adventure in which the privateer was engaged, did not terminate by the capture of a ſingle prize; and the purſuer, as he would have ſhared in her ſucceſs, was therefore juſtly held to partake of the calamities to which ſhe was afterwards expoſed.

The interlocutor of the Lord Ordinary, to which the Court unanimouſly adhered, after adviſing a petition for the defenders, with anſwers for the purſuer, was in theſe terms:

" In reſpect it is not averred that the owners of the veſſel prohi-
" bited the maſter from ranſoming, finds, That he had power to ran-
" ſom, and of conſequence to give an hoſtage in ſecurity of the bar-
" gain of ranſoming: And in reſpect it is admitted that he did ran-
" ſom the veſſel, and gave Lamont the mate as ranſomer, finds, That
" while Lamont continued in that character, under cuſtody of the
" enemy, he muſt be held as remaining in the employment of the
" owners, and therefore intitled to wages: Alſo finds, That Lamont
" is alſo intitled to the expences incurred by him in the courſe of his
" voyage and journey from the French priſon, until his arrival at
" Greenock, the ordinary place of his reſidence."

Lord Ordinary, *Hailes.* Act. *B. W. Macleod,* and Lawyers for the poor.
Alt. *Rolland, A. Abercromby.* Clerk, *Menzies.*

C.

N° CCXX.

N° CCXX. *July* 12. 1785.

WILLIAM MACCUBBIN,

AGAINST

THOMSON, and others, his Creditors.

PRISONER.—Ceſſio bonorum.—*That benefit refuſed if the bankruptcy be occaſioned by extravagance.*

MR MACCUBBIN, when ſuing for the benefit of the law in the proceſs of *Ceſſio bonorum*, was oppoſed by his creditors, on this ground: That though there had not ariſen any ſuſpicion of fraudulent concealment of his effects, yet that his inſolvency had proceeded, not from unforeſeen loſſes, but merely from an expenſive ſtyle of living, unſuitable to his income, and inconſiſtent with any reaſonable proſpect of paying the debts he contracted.

The majority of the Court conſidered the above as a ſufficient reaſon for with-holding that *flebile remedium*; and therefore

The Lords found, "That the purſuer was not intitled to the benefit in queſtion."

Act. *Honyman.* Alt. *H. Erſkine.*

S.

N° CCXXI. *July* 12. 1785.

JAMES MASSEY, and others,

AGAINST

NATHANIEL SMITH, and others.

LITIGIOUS.—*The preference of adjudications led during a proceſs of ranking and ſale at the ſuit of creditors, is not affected by that circumſtance.*

DURING the dependence of the proceſs of ranking and ſale inſtituted by the creditors of the York-buildings Company, a great number of adjudications were deduced againſt the Company's eſtates; of

which adjudications ſome were many years prior to others. In the courſe of the ranking, Maſſey and the reſt of the later adjudgers objected to the preference, claimed by Smith and other creditors from the priority of their adjudications, and

Pleaded: *Pendente lite nihil eſt innovandum;* a principle which precludes any preference from being created by diligence done while the action of ranking and ſale is depending. In this proceſs, though it be inſtituted in the name of an individual, the whole creditors are truly underſtood, as reciprocally purſuers and defenders in actions of reduction of each others titles; according to which laſt, as they ſtood at the commencement of ſuch competition, the reſpective intereſts of the creditors ought in juſtice to be determined. Such is the doctrine explicitly laid down by Mr Erſkine, b. 2. tit. 12. § 65. The adjudications above mentioned, therefore, of an earlier date, ought not to be preferred before thoſe that were later, having been led equally with them *pendente proceſſu.*

Anſwered: That the maxim which has been referred to is by no means applicable to meaſures purſued by competing creditors, is evident from the anomalous conſequences unavoidable on that ſuppoſition; of which the preſent caſe affords a ſtriking example. For otherwiſe any adjudger, by merely bringing a proceſs of ranking and ſale, could effectually preclude the *pari paſſu* preference of all other creditors. The opinion of Mr Erſkine ſeems to have been owing to his overlooking this diſtinction, between actions of ſale at the ſuit of creditors and ſuch as are inſtituted by apparent heirs, that in the laſt-mentioned proceſs, the decreet of ſale being obtained by the purſuer as truſtee for the whole creditors indiſcriminately, is conſidered as an adjudication for their common benefit, Falconar, vol 1. N° 233. Maxwell *contra* Irvine and Rome; for which reaſon alone adjudications deduced by them, after the commencement of that proceſs, muſt be unneceſſary, and are juſtly deemed ineffectual.

The Lord Ordinary pronounced this interlocutor: "Finds, That "the maxim, *Pendente lite nihil innovandum*, applies only to things "done by the debtor or defender in the action, to make the right of "the creditor or purſuer worſe; but cannot hinder the creditor or "purſuer to make his right better, even in competition with another "creditor or purſuer; and that in this caſe one of the creditors, by "raiſing a proceſs of ſale, cannot hinder the other creditors from "uſing the diligence of the law, to make their rights effectual."

The Court adhered to the above judgment.

Lord Ordinary, *Monboddo.* Clerk, *Home.* For Maſſey, &c. *Elphinſton.* Alt. *Wight.*

S.

N° CCXXII.

N° CCXXII. *July* 21. 1785.

DUKE of ROXBURGH,

AGAINST

ROBERT MEIN.

THIRLAGE.—*The words* " cum molendinis et multuris," *in the clauſe of* Tenendas *of a vaſſal's charter, import,* per ſe, *a diſcharge of thirlage.*

THE predeceſſors of Mien had obtained from the proprietors of the barony of Roxburgh, of which their lands were a part, charters containing, in the clauſe of *Tenendas*, the words " *cum molendinis et* " *multuris.*" The Duke of Roxburgh, however, having ſued Mien in an action of abſtracted multures, contended, That the above expreſſion, being confined to the *Tenendas*, and not found in the diſpoſitive clauſe, was not *per ſe* ſufficient to confer immunity from the aſtriction; and urged, in ſupport of his plea, the deciſion in the caſe of the Earl of Breadalbane *contra* Macnab; Fac. Coll. 19th July 1758.

But the Court were clearly of opinion, that the diſcharge was not leſs effectual than if the words in queſtion had occurred in the diſpoſitive clauſe, where, indeed, it was obſerved, they would not, from the nature of the right, have been ſo properly ingroſſed. It was likewiſe obſerved, that the judgment in the caſe of Macnab, which was contrary to that now given, ought not to be regarded as a precedent.

The Lords aſſoilzied the defender.

Lord Ordinary, *Eſkgrove.* Act. *Solicitor-General, H. Erſkine.* Alt. *Cullen, Dalzell.*
Clerk, *Home.*

S.

N° CCXXIII. *July* 24. 1785.

DOUGLAS, HERON and COMPANY,

AGAINST

JAMES BROWN.

INNOVATION. INHIBITION—*Strikes not againſt bills, though poſterior, if granted in the place of ſuch as were prior to it.*

JOHN DOBIE, after inhibition had been executed againſt him by Douglas, Heron and Company, granted a bill to Brown, inſtead of one of a date long prior to that diligence, and which he then retired. On this new bill Brown deduced an adjudication againſt Mr Dobie's

bie's eſtate; in the ranking of whoſe creditors Douglas, Heron and Company then

Objected, That the bill in queſtion having been affected by their inhibition, the diligence which followed was void.

Anſwered: This bill did not conſtitute a new debt, being a renewed document only of an old one, againſt which the inhibition could not ſtrike.

The cauſe was reported by the Lord Ordinary, when.

The Lords repelled the objection.

A petition reclaiming againſt this judgment was afterwards refuſed, without anſwers.

Lord Reporter, *Braxfield.* For Douglas, Heron and Company, *Blair.* Alt. *Honyman.*
Clerk, *Home.*

S.

N° CCXXIV. *July* 24. 1785.

JAMES PATON, Petitioner.

FACTOR—*Appointed by the Court of Seſſion, may make up inventories in terms of the act* 1695, *c.* 24.

THE petitioner having been appointed by the Court to manage, in the abſence of an apparent heir, the heritable eſtate of a perſon deceaſed, applied to be authoriſed to make up inventories in terms of the act 1695, c. 24.

A difficulty aroſe from the manner in which this ſtatute is expreſſed, enacting, " That for hereafter, any apparent heir ſhall have free " liberty and acceſs to enter to his predeceſſors *cum beneficio inventarii*, " or upon inventory, as uſe is, in executories and moveables; allowing ſtill the ſaid apparent heir year and day to deliberate, in which " time *he* may make up the foreſaid inventory, which *he* is to give " up, *upon oath*, full and particular, as to all lands, &c. to which the " ſaid apparent heir may or pretends to ſucceed, which inventory, to " be *ſubſcribed* by *him* before witneſſes, ſhall be given in to the clerk " of the ſhire," &c.: From which words it might be thought that the legiſlature required, in the execution of this formality, the perſonal interpoſition of the apparent heir himſelf.

The Lords, however, were clearly of opinion, that the petitioner was, from the nature of his office, ſufficiently empowered, in the place of the apparent heir, to fulfil the directions of the ſtatute. But they refuſed the petition, conſidering this as an act of adminiſtration which the factor ought to perform, without any ſpecial authority from the Court.

For the Petitioner, *Ro. Craigie.* Clerk, *Campbell.*

C.

N° CCXXV. *July* 27. 1785.

JOHN ROBERTSON,

AGAINST

ROBERT BROWN.

RECOMPENCE.—*Damage ſuſtained by a ſhip in a defence againſt a privateer, not made up by a general contribution.*

A Veſſel employed in the carrying trade between London and Sea-lock was attacked by a privateer; from which, after a ſmart action, ſhe had the good fortune to eſcape. She, however, ſuffered conſiderable damage both in her hull and rigging.

The queſtion therefore occurred, Whether the loſs was a *partial* one, that is, to be borne by the owners of the ſhip alone; or if it was *general*, and fell equally on the owners of the ſhip and of the cargo? Certificates were produced from eminent merchants in Glaſgow, expreſſing their opinion that it was of the latter ſort; but in others obtained at London, it was agreed, that although ſuch a doctrine had been formerly received, a contrary practice had prevailed during the late war.

For John Robertſon, who had made inſurance on the ſhip, it was

Pleaded: According to the principles of the Rhodian law, every loſs ſuſtained by a ſhip, for the general ſafety, and to which, in effect, the preſervation of the whole has been owing, is to be divided equally among thoſe having intereſt. Nor can the application of this rule to the preſent caſe be attended with any doubt. It would indeed be ſingular, if the loſs of a ſail, or of a maſt cut away in a ſtorm for lightening the veſſel, ſhould be defrayed in common by the owners of the ſhip and of the cargo, while that occurring in a brave and ſucceſsful defence againſt an enemy, devolved on the former only.

In the practice, accordingly, of every foreign nation of which we have any account, a damage of this ſort, equally with any other, is made up by a general contribution; Ordinances of Rotterdam, N° 291. 235. 307.; Magens, vol. 1. p. 64.; Weſket, *voce* Average, p. 25. § 3. The ſame principle appears to be entertained by the moſt eminent Scottiſh merchants, compared to which, in interpreting the commercial dealings of Scotſmen, the opinions of perſons in London, when unauthoriſed, eſpecially, by judicial deciſions, and avowedly oppoſite to the practice of that city in former times, ought not to have any weight.

Anſwered for Robert Brown, the owner of the cargo: The mercantile practice of London, in a queſtion of this ſort, is deſervedly of the higheſt authority. It is indeed to be viewed as the great *Law Merchant* of the Britiſh empire, a deviation from which, by any local cuſtom or uſage, as it would infallibly produce embarraſſment in trade, ought to be anxiouſly avoided.

The reaſonableneſs of its determination in the preſent caſe cannot well be diſputed. It was only thoſe loſſes which aroſe from the voluntary act of the ſhipmaſter, as the cutting away of a maſt, or the throwing of goods overboard, for which, by the Rhodian law, a contribution could be demanded. For goods, therefore, which had been loſt by ſome extraneous accident, or for the rigging of the ſhip carried off by the violence of a ſtorm, though from thence a benefit might eventually ariſe, ſuch a claim was not admitted. The damage occaſioned to a ſhip by the attack of an enemy evidently belongs to this laſt claſs, and is to be viewed in the ſame light.

As the articles of which a lading is compoſed are for the moſt part much more valuable than the ſhip, and at the ſame time apt to be more materially injured in an engagement, the owners of the latter alone are gainers by this deciſion. Nor to this can it be objected, that the loſs ſuffered by the cargo does not contribute to the ſafety of the ſhip, and therefore does not fall within the general rule; for it is not the ſhip itſelf, any more than the cargo, but the bravery of the mariners, and the arms in their hands, which are the means of preſerving the whole.

It was likewiſe mentioned for the owner of the cargo, that the ſhip had been advertiſed as carrying arms for defence; but as no additional freight was ſtipulated on that account, this circumſtance did not ſeem to have any weight.

The Lord Ordinary found, agreeably to the opinion of the London merchants, that no contribution was due; which judgment was adhered to by the Court, after adviſing a reclaiming petition and anſwers. A ſecond reclaiming petition was preſented, and refuſed without anſwers.

Lord Ordinary, *Braxfield.*
For Robert Brown, *Maclaurin.*

For John Robertſon, *Lord Advocate, H. Erſkine.*
Clerk, *Menzies.*

C.

N° CCXXVI.

N° CCXXVI. *July* 27. 1785.

JOSEPH CORRIE,

AGAINST

JAMES AITKEN, and others.

BILL OF EXCHANGE.—PRIVILEGES OF BILLS,—*Do not exclude exceptions arising from the fraud of the holders.*

JOSEPH CORRIE sued James Aitken and others for payment of a bill of exchange which had been accepted by them in favour of Ninian Steel, and by him indorsed to the pursuer.

The defenders contended, That the indorsation had been fraudulently devised between the drawer and indorsee, in order to preclude their just defences, and they offered a proof of facts sufficient to shew that this was the case.

Observed on the Bench: Though bills of exchange, when in the possession of fair and onerous indorsees, are, like bags of money, liable to no exception arising from the fraud of anterior holders; a collusive transference, such as is here alleged, ought not to be attended with the same privileges.

The Lords unanimously allowed the proof here offered.

Lord Ordinary, *Braxfield.* Act. *Honyman.* Alt. *H. Erskine, John Erskine.*
Clerk, *Colquhoun.*

C.

N° CCXXVII. *July* 27. 1785.

JAMES GOODFELLOW,

AGAINST

ANDREW MADDER.

BILL OF EXCHANGE.—*When the circumstances attending the indorsation of a bill are proveable only by the oath of the indorsee, it is not competent to insist on his undergoing a previous examination.*

MADDER was charged with horning, at the instance of Goodfellow, for payment of a bill of exchange which had been accepted by him. He presented a bill of suspension, on this ground, that he had

had been fraudulently induced to adhibit his ſubſcription to the acceptance without full value, and he inſiſted for the charger's being judicially examined; urging, that in this manner he would have an opportunity, if the charger ſhould advance what was not true, to diſprove it, and ſo to invalidate his claim.

Obſerved on the Bench: Where circumſtances of fraud are relevantly ſtated againſt the holder of a bill of exchange, and a proof offered, ſuch a previous examination as is here required might be highly expedient, both for ſuperſeding the neceſſity of farther evidence, and for the better inveſtigation of the truth. But to allow that method of proceeding, in conſequence of general allegations like the preſent, would tend in a great meaſure to obſtruct that free currency of bills of exchange which is ſo eſſential to trade.

The Lord Ordinary found the letters orderly proceeded. And his judgment was affirmed by the Court, after adviſing a reclaiming petition for the ſuſpender, with anſwers for the charger.

Lord Ordinary, *Monboddo.* Act. *H. Erſkine.* Alt. *Dalzell.* Clerk, *Home.*

C.

N° CCXXVIII. *Auguſt* 6. 1785.

JAMES COLQUHOUN,

AGAINST

JAMES BUCHANAN, and others.

GAME.—PUBLIC POLICE.—*Diſtinction between hunting foxes for the purpoſe of ſport, and the purſuit of theſe animals by farmers for the preſervation of their flocks.*

JAMES BUCHANAN, and other farmers his neighbours, having traverſed the fields, and gone over the fences belonging to Mr Colquhoun, in purſuit of foxes, were, on a complaint entered by him, found liable by the ſheriff of the county in the penalties annexed, by the ſtatute 1685, to "the breaking down or filling up any ditch, "hedge, or dike, whereby ground is incloſed," and to "the leaping, or ſuffering horſe, nolt, or ſheep, to go over any ditch, hedge, "or dike."

The defenders preferred a bill of advocation, juſtifying their proceedings as neceſſary for the protection of their ſheep; when, in ſupport of the judgment of the ſheriff, Mr Colquhoun

Pleaded:

Pleaded: It is now a fixed point, that landed gentlemen, qualified to hunt, may not, even in the purſuit of foxes, or other noxious animals, enter the incloſures of any proprietor without his conſent, Fac. Col. 3d March 1778, Marquis of Tweeddale *contra* Hugh Dalrymple and others. The ſecurity of owners of land, in the undiſturbed and excluſive uſe of their property, was juſtly deemed more eſſentially connected with the general welfare, than the deſtruction of foxes, though accompliſhed by men to whom it had been permitted by the legiſlature as an amuſement, and who, at the ſame time, were poſſeſſed of a fortune ſufficient to inſure an indemnification to thoſe whoſe grounds they might occaſionally injure. It cannot then be imagined that a diſtinction is to be made in favour of the defenders, to the effect of encouraging idleneſs and diſſipation in the lower ranks, and of affording to them a pretence for breaking into incloſures, and committing damage which they are utterly unable to repair. Indeed, to obviate a diſtinction apparently ſo inconſiſtent with the genius of our law, it would be ſufficient to obſerve, that the ſtatute on which the defenders have been condemned, is general, and admits not an exception from motives of utility, in favour of any claſs of men whatever.

Anſwered: The ſtatute 1685 was not made to convert the acts therein ſpecified, into delinquincies in every caſe, but to reſtrain, by an additional ſanction, ſuch proceedings as were before puniſhable as treſpaſſes at common law. In no caſe, therefore, can the penalties be due, where the entry into the ground, or breaking into the incloſures, though not permitted by the owner, is yet in its own nature lawful, or even merely juſtifiable. Hence they could not be demanded from one who, in purſuing a mad dog or a thief, had entered the lands of another, whether incloſed or not. And to the ſame principle muſt be referred the cuſtom of extirpating foxes in the manner here followed, as has been immemorially done in thoſe parts of Scotland where the employment of the inhabitants conſiſts in rearing ſheep, or other animals liable to be deſtroyed by foxes. It is indeed ſo clearly grounded in natural reaſon, as to be obſerved even among thoſe European nations where, beſides the prohibition ariſing from the rights of landed proprietors, the animals known under the denomination of *game*, are protected as a part of the royal prerogative, or excluſively appropriated to perſons of the higheſt rank. Perezius, lib. 11. tit. 44.; Blackſtone, book 3. chap. 12.

It ſeemed to be admitted by the defenders, That they were obliged to repair any damage occaſioned by them; and by the purſuer, That his incloſures had not been hurt at this time.

The Lord Ordinary ſuſtained the reaſons of advocation, and found expences due. After adviſing a reclaiming petition for Mr Colquhoun, with anſwers for the defenders, the Lords unanimouſly adhered to that judgment. And they refuſed a ſecond reclaiming petition for Mr Colquhoun, without anſwers.

Lord Ordinary, *Monboddo.* Act. *Baillie.* Alt. *Cullen.* Clerk, *Sinclair.*

C.

N° CCXXIX. *Auguſt* 9. 1785.

JAMES SPEDDING,

AGAINST

Meſſrs HODGSON and DONALDSON.

BANKRUPT.—*Proof of abſconding.*

A Meſſenger having gone to the houſe of Thomas Buſhby, in order to execute a caption againſt him, and having ſearched for him there, without being able to find him, reported this proceeding in his *execution.*

In a competition of Buſhby's creditors, it was afterwards debated, Whether the above circumſtances, joined to his inſolvency, were ſufficient to bring him under the deſcription of the ſtatute of 1696.

Obſerved on the Bench: The abſence of a debtor from his dwelling-houſe at a time when he is notoriouſly inſolvent, will create a *præſumptio juris* of abſconding. Not being, however, a *præſumptio juris et de jure*, it may be elided by a contrary proof.

The Lords found, "That Thomas Buſhby, by the execution of "ſearch produced, fell under the deſcription of the ſtatute 1696."

Lord Ordinary, *Alva.* Act. *Elphinſton.* Alt. *G. Fergusſon.* Clerk, *Home.*

S.

N° CCXXX. *Auguſt* 10. 1785.

ROBERT FALL,

AGAINST

ALEXANDER SAWERS.

PROOF.—WITNESS.—*Objection to a witneſs ſuſtained, that having been previouſly examined in a precognition, his declaration had been ſhown to him before he was re-examined.*

MR FALL, with a view of commencing a criminal proſecution againſt Alexander Sawers, applied to a Juſtice of the Peace, by whom ſeveral witneſſes were examined. Afterwards, having dropped his original purpoſe, he brought, in the Court of Seſſion, a civil action for damages, in which a proof was allowed.

Mr

Mr Fall intended to adduce as witneſſes the perſons who had been *precognoſced;* and before their examination took place, his agent tranſmitted to each of them a copy of their own declarations, together with the declaration of a particular witneſs who was conſidered as the leading one, that they might recollect, as he ſaid, what had paſſed when the facts were more recent.

The defender inſiſted, that this procedure diſqualified thoſe witneſſes from giving evidence for the purſuer, and

Pleaded: Precognitions are allowed in criminal matters, to enable the public proſecutor to judge of the expediency of a trial, and to form his indictment with propriety. In queſtions of a civil nature they are altogether improper, as tending to give to one party an undue advantage over his antagoniſt, and affording a dangerous opportunity of tampering with the witneſſes; Erſkine, book 4. tit. 4. § 84. 86.; 4th Auguſt 1778, Bogle *contra* Yule.

But even in criminal proſecutions, the declarations of thoſe who have been examined in a precognition, are not to be uſed as evidence in the trial itſelf. They ought to be produced before the Judge, and cancelled by his authority. This the witneſſes are entitled to demand, that they may not, from the want of a diſtinct recollection, be expoſed to a ſuſpicion of perjury. And it is ſtill more the undoubted right of the defender, who ought to be tried only by that proof to the adducing of which he is a party.

The opportunity here given to the witneſſes, of comparing what they had ſaid with the other teſtimonies, was in the higheſt degree reprehenſible and illegal. To reſtrain the freedom of evidence, is the leaſt evil which could enſue from it. Were ſuch a practice permitted, nothing would be more eaſy, than, under the colour of a precognition, to form a combination for depriving any one of his fortune, or his life, and, by afterwards giving to the perſons employed a peruſal of what they themſelves and their confederates were to ſwear, to preclude almoſt every avenue to detection.

It appeared, that the precognition had been *bona fide* taken for the purpoſe of bringing a criminal action, and that one of the witneſſes, hearing of his intended re-examination, had inſiſted upon ſeeing the declaration he had formerly emitted. The purſuer's character too, as well as his agent's, removed every idea of an unfair intention on their part. The Court, however, unanimouſly ſuſtained the objection. The cancelling of his previous declaration, it was obſerved, every witneſs has a right to demand, though not inſpection of it before he be examined in the trial; but to ſend, as was here done, the whole proof to each witneſs, was highly unwarrantable, and of the moſt pernicious tendency.

The Lords ſuſtained the objection to the witneſſes to whom their declarations had been ſent previous to their examination, and found, that their evidence could not be admitted in this cauſe; and likewiſe found the agent for the purſuer liable in a fine of L. 5, for the uſe of the poor.

Lord Reporter, *Rockville.* Act. *Wight, Buchan-Hepburn.*
Alt. *Mackintoſh, Maclaurin.* Clerk, *Home.*

C.

DECISIONS

OF THE

COURT OF SESSION.

N° CCXXXI. *November* 17. 1785.

GEORGE MAXWELL, and others,

AGAINST

ADAM GIB.

BANKRUPT. Act 1696.—*The apprehending of an insolvent debtor without imprisonment, or taking into custody, insufficient to qualify the statutory bankruptcy.*

MAXWELL, and other creditors of Ebenezer Macgeorge, who was insolvent, sued on the act of parliament of 1696, for reduction of an heritable security granted by their debtor in favour of Gib. In order to establish the statutory bankruptcy, the pursuers produced several executions of caption, bearing, "That the messenger had apprehended "the debtor; but that, without imprisoning or taking him into custo- "dy, he had afterwards liberated him on promise of payment."

The Court repelled that reason of reduction.

Reporter, Lord *Alva.* Act. *Corbet.* Alt. *H. Erskine.* Clerk, *Home.*

S.

N° CCXXXII. *November* 17. 1785.

ALEXANDER NAIRNE,

AGAINST

Colonel WILLIAM MERCER.

HUSBAND AND WIFE.—*A debt contracted for the benefit of the ſeparate eſtate of a married woman, though of ſuch a nature that the huſband was bound to diſcharge it, is ſtill effectual againſt her heirs in that eſtate.*

COLONEL MERCER's predeceſſor in his eſtate, a married woman, granted a bond, along with her huſband, for a ſum of money borrowed in order to pay off the annualrents which had ariſen during the marriage, of a debt that was a burden on the lands; and in this bond Mr Nairne concurred as cautioner. The whole parties afterwards joined in a ſecond bond for an equal ſum, which was to be applied for the diſcharge of the firſt; and again in a third bond, for the purpoſe of extinguiſhing the ſecond. No aſſignation, it may be remarked, from the original creditor on the eſtate, had been obtained. The debt was ultimately paid by the cautioner; who having ſued Colonel Mercer, the heir, for his relief, the latter.

Pleaded: No valid perſonal obligation can be laid on a woman *veſtita viro;* and as to the effect of a debt reſpecting the ſeparate eſtate of a wife, it belongs not to the preſent caſe. The original debt, which was a burden on the ſucceſſion, ceaſed when the firſt of the bonds was granted, no aſſignation having been made, by which only it could have been continued. In theſe bonds the huſband was the proper debtor. He drew the rents of the eſtate; and if he employed them for extinguiſhing his own peculiar debts, or in any other way than in paying the intereſt due during the marriage on thoſe of his wife, he muſt ſtill remain indebted to that amount.

Anſwered: This claim is not made in virtue of the wife's perſonal obligation, except ſo far as by her bond ſhe certifies the uſe to which the money was applied, that of clearing away a burden on her ſeparate property. On this account there could be no neceſſity for an aſſignation to the original creditor's right, ſince that was nothing different from the rights of any of the creditors in the bonds, which were all equally burdens on an eſtate for the benefit of which the money borrowed had been employed. It is true, the huſband was bound to relieve

lieve the wife, and ſo, as to her, was the proper debtor; but this does not ſave her at the hands of creditors.

The cauſe was reported by the Lord Ordinary; when the Lords repelled the defence.

A reclaiming petition againſt this judgment was refuſed without anſwers.

Reporter, Lord *Eſkgrove*. Act. *Solicitor-General* and *Blair*. Alt. *C. Hay*.
Clerk, *Colquhoun*.

S.

N° CCXXXIII. *November* 17. 1785.

JOHN RUTHERFORD,

AGAINST

The PRESBYTERY of KIRKALDY.

JURISDICTION.—*A ſentence of a church-court affecting a party's civil concerns, though ariſing incidentally out of a matter of eccleſiaſtical cogniſance, ſubject to review by the civil juriſdiction.*

THE Preſbytery of Kirkaldy having taken offence at the behaviour of Rutherford in their court, on occaſion of the ſettlement of a miniſter, as diſreſpectful, and otherwiſe improper, paſſed a ſentence, by which he, a writer by profeſſion, and who had acted as an agent in cauſes before them, was "declared incapable of appearing in fu- "ture in that character at the bar of this preſbytery;" and at the ſame time Mr Rutherford was rebuked from the chair.

Rutherford, conſidering theſe proceedings as hurtful to his character and intereſt, inſtituted againſt the preſbytery an action before the Court of Seſſion, in which he concluded for the reſcinding of the above ſentence, for public notification of ſuch reſciſſion, and for a large ſum in name of damages.

Pleaded for the defenders: Conceſſa juriſdictione, concedi videntur omnia ſine quibus juriſdictio iſta explicari non poteſt. The proceedings in queſtion, therefore, as much as the purely eccleſiaſtical matter to which they referred, came under the independent juriſdiction of the church-courts. Fac. Coll. 11th Auguſt 1780, Robertſon *contra* Kirk-Seſſion of Cupar.

Anſwered: The incapacitating of the purſuer to act in the line of his

his profeſſion, as it affects his civil, not his eccleſiaſtical ſtate, belongs not to the juriſdiction of the church. Nor, until theſe proceedings be firſt ſhewn to have been neceſſary or proper, can they be juſtified by a maxim which it were abſurd to conceive as giving a ſanction to any act of injuſtice.

Obſerved on the Bench: This Court has not the power of reviewing thoſe ſentences which reſpect a man's *ſtatus* in the church. But the preſent is merely a civil matter; and though ſufficient grounds for ſuch a judgment, incapacitating the purſuer, might be figured, it appears in this inſtance ill founded.

Obſerved farther: The purſuer ought to have applied for redreſs by declarator merely, or by ſuſpenſion, in neither of which proceſſes the preſbytery would have had occaſion to appear; and if they had, they would, like a ſheriff defending his own decree, have been found liable in damages. The preſbytery having been improperly called in this action as parties, in ſupport of their ſentence, are intitled to expences. As to theſe, however, this opinion was over-ruled.

The cauſe was reported by the Lord Ordinary; when

The Court ſuſtained the reaſons of reduction reſpecting the incapacity *in futurum:* but repelled them in all the other particulars; and found no expences or damages due to either party.

Reporter, Lord *Henderland.* Act. *M'Cormick.* Alt. *Robertſon.* Clerk, *Home.*

S.

N° CCXXXIV. *November* 18. 1785.

The CREDITORS of JOHN MACGHIE,

AGAINST

JOHN TAIT.

SOLIDUM ET PRO RATA.—*A partner of a company having paid the debts, can only be ranked on the eſtates of the other partners for a proportion of the ſums advanced, correſponding to their reſpective ſhares.*

WHEN Douglas, Heron, and Company, ſtopped payment, the ſolvent partners contributed L.286,000, to ſatisfy the moſt preſſing creditors.

Afterwards,

Afterwards, the eſtate of Mr Macghie, a member of this company, having been ſold judicially, Mr Tait, as truſtee for theſe contributing partners, claimed to be ranked on that eſtate for the whole ſums advanced; and

Pleaded: The creditors of a company are intitled to be ranked on the eſtate of every partner for the whole ſums due to them, and to draw a rateable proportion of the effects, provided they do not ultimately receive more than the company owes. 26th July 1776, Creditors of Carlyle *contra* Creditors of Dunlop; 23d George III. c. 18.

The claimants here do not ſtand on a different footing. Their character of partners cannot take away the *jus crediti*, which payments, ſo far exceeding their ſhare of the loſs, have eſtabliſhed in their favour. Nor is it poſſible to diſtinguiſh their ſituation from that of the creditors, who received the monies contributed, and from whom, if it were neceſſary, they can ſtill require a formal aſſignment of all their rights.

Anſwered for Mr Macghie's other creditors: The perſons who advanced ſuch large ſums to ſave from immediate legal execution their own eſtates, as well as thoſe of the other partners, are to be conſidered as truſtees for the whole. In claiming retribution, more cannot be demanded by them from the bankrupt partners than from thoſe who continue ſolvent.

The contrary method of proceeding would be attended with the moſt fatal conſequences. For as each of the bankrupt partners could, in his turn, demand from every one of the *ſocii* the ſame ſums for which his own eſtate has been attached, the whole members of the company might, in this manner, be involved in one common ruin.

The Lords unanimouſly found, "That John Tait, truſtee for the "Duke of Queenſberry and others, was only intitled to be ranked "on the eſtate in queſtion, for a proportion of the ſums claimed by "him, correſponding to the ſhare of ſtock held by Mr Macghie, the "common debtor."

Lord Reporter, *Juſtice-Clerk.* Act. *Abercromby.* Alt. *A. Ferguſſon.* *Orme*, Clerk.

C.

N° CCXXXV. *November* 18. 1785.

JEAN WHITE,

AGAINST

WILLIAM HEPBURN.

Proof of Marriage.

William Hepburn and Jean White, both young perſons of middling rank, having contracted an intimacy with each other, the conſequence was the birth of a child. His having had that intercourſe was not denied by Hepburn; and it was proved by witneſſes, that while Jean White was with child, he ſaid to different perſons "that he was married to her, or that ſhe was his wife;" cauſed proclamation of bans to be made between him and her; and entered with her father on a treaty of marriage. But there was no evidence of any ſuch treaty, or of a promiſe of marriage, prior to *copula*, and but a very ſlight proof that any courtſhip had then taken place.

The Commiſſaries "found facts, circumſtances, and qualifications, "proven relative to infer marriage betwixt the purſuer and defender." This ſentence was brought under review by advocation; and,

"The Lord Ordinary having reported the cauſe upon informations "to the Lords, refuſed the bill, and remitted the cauſe to the Com-"miſſaries, with this inſtruction, that they *alter* their interlocutor, "finding facts, circumſtances, and qualifications, proven relevant to "infer marriage between the parties, and aſſoilzie the defender."

Reporter, *Lord Braxfield.* Act. *Honyman.* Alt. *Rolland, Mat. Roſs.* Clerk, *Home.*

S.

N° CCXXXVI.

N° CCXXXVI. *November* 22. 1785.

JEAN LISK, and her *Curator ad litem*,

AGAINST

Her HUSBAND, and his CREDITORS.

HUSBAND AND WIFE.—*An aliment found due to a wife out of the produce of a terce derived from her firſt huſband, in a queſtion with her ſecond huſband's creditors.*

JEAN LISK was the widow of a gentleman, at whoſe death ſhe became intitled to a terce out of his lands, amounting to L. 600 yearly.

She was afterwards induced, by fraud and deception, to marry a perſon who had long been in a ſtate of bankruptcy. His creditors, in virtue of a ſequeſtration, took poſſeſſion of his effects; and Mrs Liſk, after endeavouring in vain to withdraw altogether the rents of her terce-lands *, inſiſted for a yearly aliment out of that fund.

Pleaded for the creditors of the huſband: The legal conſequences of this marriage, though it was brought about by improper means, have been found to ſubſiſt in their fulleſt extent. The whole moveable effects antecedently belonging to the purſuer, together with the yearly produce of her real eſtate, are thereby fully veſted in her huſband. She cannot now pretend to a greater intereſt in the rents of her terce-lands than in any other part of his property. On the other hand, the marriage-ſtate alone, independent of ſome peculiar ſtipulation, gives no ſupport to a demand like the preſent. A wife's claim to an aliment muſt, in every caſe, bear proportion to her huſband's immediate means of ſubſiſtence. When his eſtate has been ſquandered away, or, by the act of law, transferred to his creditors, her ſituation, however calamitous, admits not of any legal remedy; 25th November 1709, Turnbull. From a contrary doctrine, indeed, very irregular conſequences would follow. Thus, if the preſent claim were ſuſtained, it would unavoidably happen, that either the purſuer's huſband would indirectly obtain from his creditors an aliment, to which he has no right; or to the extent of the allowance due to him by his wife, which, at every period, muſt be a ſhare of what ſhe has, his creditors would be at liberty to reſume the funds deſtined to her.

Anſwered: The circumſtances of the huſband, it muſt be owned, are the ſole meaſure of the maintenance due to his wife, when conſi-

* Vid. p. 331. ſup.

dered

dered merely as a member of his family. But when ſhe happens to be poſſeſſed of ſuch an eſtate as does not fall under the *jus mariti*, though its annual profits during the coverture are ſubject to his adminiſtration, the caſe is very different. Here the huſband's right is by the law itſelf incumbered with a ſuitable maintenance to his wife. He cannot avail himſelf of the one, without becoming liable to the other; nor can the caſe of his creditors, as brought into his place, by diligence merely of a perſonal nature, be ſeparated from his own; 14th November 1770, Mary Jamieſon *contra* Iſabella Houſton. The confuſion ſuppoſed to ariſe from ſuch a determination in the preſent caſe can never happen, as the ſums found due to the purſuer will be rendered independent of her huſband's *jus mariti*.

Some of the Judges, who thought the claim well founded, ſeemed to reſt their opinion chiefly on the circumſtances of deception in which this marriage had originated. The majority, however, conſidered it to ariſe, from the nature and ſituation of the purſuer's eſtate. By our ancient law, it was obſerved, the *jus mariti* was thought to be of that nature which no covenant could controul or diminiſh; and while this notion prevailed, ſuch a claim as the preſent could not be admitted. But thoſe rigid maxims have ſince been juſtly exploded. A woman, *veſtita viro*, is now enabled to maintain every ſuit againſt her huſband which is requiſite for effectuating the obligations he has come under to her. As, therefore, in a queſtion with the huſband, the purſuer would have been intitled to an aliment correſponding to the produce of her own eſtate, this being neceſſarily implied in the legal aſſignation of her property, which reſults from the marriage; ſo the intervention of his creditors ſhould not here make any difference.

By one interlocutor, the Lords found "the purſuer intitled to an "aliment during the ſubſiſtence of the marriage; and that the ſame, "as being merely alimentary, is excluſive of her huſband's *jus mariti*, "and debts of all kinds preceding the commencement of her preſent "aliment; and modified the ſame to L. 200 Sterling." On adviſing a reclaiming petition for the Creditors, with anſwers for Mrs Liſk, the ſums formerly awarded were reſtricted to L. 150 Sterling.

Lord Ordinary, *Ankerville*. Act. *H. Erſkine, Wight*. Alt. *Lord Advocate, Abercromby*. Clerk, *Orme*.

C.

N° CCXXXVII.

N° CCXXXVII. *November* 22. 1785.

THOMAS GRIERSON,

AGAINST

Meſſ. DOUGLAS, HERON, and Company, and others.

ADJUDICATION. Act 1661.—*Adjudications, if within year and day, not affected by certification in the proceſs of ranking and ſale.*

IN the proceſs of ranking of the creditors of Brown of Barharrow, it was, in behalf of Grierſon,

Objected: That certain adjudications had been led, not only during the dependence of the action of ſale, but even after decreet of certification had been pronounced and extracted; that by this laſt particular theſe adjudications were diſtinguiſhed from thoſe in the caſe of Maſſey *contra* Smith, 12th July 1785 *; and, upon that ground, that preference had been denied to ſeveral adjudging creditors on the eſtate of Riccarton-holm, 25th January 1783 †.

Anſwered: As it is eaſy for any adjudger to obtain decree of certification in a proceſs of ſale within a much leſs time than a year poſterior to his adjudication becoming effectual, he might, if the objection were good, exclude at his pleaſure the benefit of the ſtatute of 1661. In the caſe of Riccarton-holm, the adjudication in queſtion had not been deduced till after *the year and day from the firſt effectual one* was elapſed; ſo that there the ſtatutory benefit was not affected.

The Lord Ordinary "repelled the objection;" and

The Court adhered to that interlocutor.

Lord Ordinary, *Braxfield.* Act. *A. Abercromby.* Alt. *C. Hay.* Clerk, *Home.*

S.

* P. 347. ſup. † P. 130. ſup.

N° CCXXXVIII. *November* 23. 1785.

Meſſ. NEWTON and COMPANY,

AGAINST

Meſſ. COLLOGAN and COMPANY, and others.

ASSIGNATION.—*Holograph acknowledgement of intimation, by the debtor, though unatteſted, ſupplies the want of a notorial inſtrument.*

SAMUEL BEAN aſſigned to Meſſ. Collogan and Company, and to other perſons, a bond which had been granted to him. Inſtead of a notorial inſtrument, certifying intimation of theſe aſſignations, there appeared on the back of them a holograph writing to that effect, ſubſcribed by the debtor. In a competition of Bean's creditors, Newton and Company objected to this evidence of intimation, and

Pleaded: This writing, though holograph, not being atteſted by witneſſes, cannot prove its own date; and therefore is to be underſtood as if it really bore no date. As ſuch, then, it muſt be ineffectual. Otherwiſe, indeed, debtors might eaſily antedate intimations, for the purpoſe of unduly preferring favourite creditors. Equipollents, if admitted, ought ever to be guarded againſt ſuch frauds.

Anſwered: To receive ſuch proof of intimation, is the univerſal uſage; and, in particular, it is daily exemplified by the tranſactions of the public banks. The deciſions of the Court ſeem likewiſe to give countenance to it. Durie's Deciſions, p. 484; Fountainhall, vol. 2. p. 397.; Kames's Rem. Dec. 12th June 1751; Turnbull *contra* Stewart.

The cauſe was reported by the Lord Ordinary, when

A great majority of the Court were influenced by the conſideration of the common uſage; though ſome of the Judges obſerved, That ſuch a practice was ſo erroneous that it ought not to be regarded.

The Lords found, That the intimation was ſufficiently aſcertained.

Reporter, Lord *Monboddo*.
Alt. *Elphinſton*, *G. Ferguſſon*.

For Newton and Company, *Rolland*.
Clerk, *Home*.

S.

N° CCXXXIX.

N° CCXXXIX. *November* 23. 1785.

DUNCAN JOHNSTON,

AGAINST

MARGARET CLARK.

TUTOR AND PUPIL.—*A guardian named by a father to his natural child, intitled to demand the cuſtody of the child, from a perſon to whom the father had committed it.*

ANDREW CLARK, reſiding in the iſland of Jamaica, put under the care of Margaret Clark, his ſiſter, who lived in this country, a natural ſon of his, while an infant. By his teſtament, he "nomina-"ted Duncan Johnſton guardian *to the perſon* and eſtate of his ſaid "reputed ſon." Some years after the arrival of the child, the father being then dead, Johnſton brought an action againſt Margaret Clark, concluding for delivery to him of the perſon of the boy; in defence againſt which, ſhe

Pleaded: The law does not recogniſe any man as the father of a baſtard, nor confer on him, as ſuch, that *patria poteſtas*, or fatherly guardianſhip, from which alone can ſpring the power of naming tutors to his child. He is viewed in no other light than any ſtranger, who, though he may appoint perſons to manage an eſtate beſtowed by him on a pupil, will not acquire the authority over his perſon. The purſuer, then, is not a legal tutor, and cannot ſue in this action. The defender, it is true, received the child from her brother; but the queſtion is not as to redelivery to him. It is demanded to be made to the purſuer, and in a character which is not authoriſed or known in law.

Anſwered: It is not neceſſary here to maintain the purſuer's legal appointment as tutor. If Andrew Clark, who committed to the defender the cuſtody of his ſon, had himſelf the right of redemanding that cuſtody, and if he has conferred that power on the purſuer in clear and direct terms, by appointing him *guardian to the perſon of the child*, the preſent claim muſt of courſe be ſuſtained.

The purſuer's argument was adopted by the Court; and it was farther obſerved, That if a perſon beſtows an eſtate on a child who has not a lawful father, he may appoint a guardian to that child, to the effect of directing his education, as well as of taking charge of his eſtate.

The

The Lord Ordinary decerned in terms of the libel; and

The Court adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Hailes.* Act. *Nairne.* Alt. *H. Erſkine.* Clerk, *Colquhoun.*

S.

N° CCXL. *November* 24. 1785.

JOHN CATHCART, and others,

AGAINST

JAMES WEIR, and others.

KIRK. PRESUMPTION.—*The diviſion of the area of a church preſumed from long poſſeſſion.*

THE old pariſh-church of Greenock was built in the end of the laſt century, ſome years after the erection of that town into a burgh of barony. The pariſh conſiſted likewiſe of a landward diſtrict, a part of which belonged to Sir John Schaw; and of the remainder another perſon was ſuperior; between whom and the former, in conſequence of a written contract, a diviſion of the area of the church took place. Sir John's ſhare was then, and has been ever ſince, occupied by the country-tenants, and town-feuers of his eſtate, in diſtinct portions, on which their reſpective ſeats were fitted up. But if any regular ſubdiviſion was made among them, the evidence of it, as not now exiſting, muſt have been loſt.

Such had been the ſituation of this church for more than double the years of the long preſcription, when a recent ſet of feuers, in an action brought by them, contended for a new diviſion of the area, according to their reſpective proportions of valued rent; alledging, that hitherto the area had not been regularly or legally ſubdivided.

The cauſe was reported by the Lord Ordinary, when

The Court were of opinion, That there was, from the long poſſeſſion, ſufficient preſumptive proof of a regular and proper diviſion; and therefore

The Lords aſſoilzied the defenders.

Reporter, Lord *Braxfield.* Act. *Murray.* Alt. *M. Roſs.* Clerk, *Home.*

S.

N° XLI.

N° CCXLI. *November* 24. 1785.

HUGH DUNLOP,

AGAINST

RICHARD ALLAN.

PERICULUM.—*Inſurance. Deviation on account of circumſtances not connected with the ſubjects inſured, found not to vacate the policy.*

HUGH DUNLOP obtained from Richard Allan inſurance of goods, on a voyage from the river Clyde, in Scotland, to the iſland of St Chriſtopher's, in the Weſt Indies.

Refore his arrival at St Chriſtopher's, the ſhipmaſter was informed that the iſland was in the poſſeſſion of the enemy. He was alſo informed, that though, by the terms of the capitulation, Mr Dunlop's property was liable to no riſk, yet that the greater part of the cargo, conſiſting of articles of a different kind, would, as well as the ſhip itſelf, on his proceeding to St Chriſtopher's, be expoſed to immediate ſeizure.

He therefore put the inſured goods on ſhore at Antigua, intending to ſend them from thence to St Chriſtopher's; but before an opportunity of doing this occurred, the warehouſe in which they had been depoſited was ſet on fire, and every thing in it conſumed.

An action having been afterwards brought againſt the underwriter for the inſured values, he

Pleaded in defence: The deviation which here occurred, as it was nowiſe neceſſary for the ſafety of the goods inſured, muſt relieve the underwriter from the loſs. It would indeed be contrary to reaſon, that a circumſtance peculiar to other articles, ſhould make him reſponſible for a hazard of which he was ignorant, and for which no correſponding premium could be ſtipulated. Weſket, *voce* Deviation, p. 149.; Strange's Reports, p. 1173, Stamma *verſus* Brown.

Anſwered: In the caſe of an unneceſſary deviation, the inſurance-contract is underſtood to be vacated. But this cannot be urged in the preſent caſe, where the meaſures purſued by the ſhipmaſter in following out the voyage, were equally unavoidable as if they had been occaſioned by the violence of a ſtorm, or by any other unforeſeen accident. In circumſtances ſuch as theſe, it is by an action againſt the owners of the goods ſaved in conſequence of the deviation, and not by with-holding the inſured values, that the underwriter muſt provide for his indemnification.

The determination of the Judge-Admiral, afterwards affirmed by the Court of Seſſion, was in theſe words:

" Repels the defences, finds the defender liable in the ſums ſued " for; reſerving to him his recourſe againſt the perſons by whoſe " conduct he has been made liable."

Lord Ordinary, *Braxfield.* Act. *Wight.* Alt. *A. Campbell.* *Home*, Clerk.

C.

N° CCXLII. *November* 30. 1785.

WILLIAM CAMPBELL,

AGAINST

ROBERT SILLER.

SEQUESTRATION.—TACK. *A leaſe having been granted of lands which were ſequeſtrated after its date, but before the term of entry, the leſſee found intitled to require poſſeſſion, in implement of the contract.*

SIR THOMAS WALLACE, in 1775, granted to Siller, at a high rent, a leaſe of a farm, for ninety-nine years, to commence in 1780. In 1778, the creditors of the landlord, ſome of whom had obtained heritable ſecurities, brought a proceſs of ſale of his eſtate, which was then laid under ſequeſtration. Afterwards Siller was admitted into poſſeſſion by the judicial factor, who for ſeveral years had continued to receive the rents from him, when an action of reduction of the leaſe was raiſed by Mr Campbell, the purchaſer; who

Pleaded: Before the term of entry by this leaſe, the landlord was diveſted of the adminiſtration of his eſtate. His creditors, already infeft in it, had attained poſſeſſion by the factor under the ſequeſtration; a thing declared by the uniform ſtyle of the judicial proceedings. Now, as a tack not clothed with poſſeſſion is not effectual againſt a purchaſer whoſe right has been completed, it muſt, in the preſent inſtance, be equally unavailing, either againſt the creditors, or againſt the purſuer, as coming into their place. Such accordingly was the deciſion in the caſe of Lord Cranſton's Creditors *contra* Scott; Fac. Coll. 4th January 1757.

Nay, though the creditors had been uninfeft, their adjudications alone would be the title of poſſeſſion by their factor; an effectual right being thus conſtituted, excluſive of ſubſequent poſſeſſion under any leaſe. If indeed the factor has yielded poſſeſſion to the defender, his

his act was unauthoriſed, and conſequently void. He had no power to grant ſuch a tack, and as little of courſe to eſtabliſh or give force to it, while, though granted, it was ineffectual.

Anſwered: The real ſecurities of creditors are not incompatible with the right of property in their debtor, of which they are only limitations or burdens. At the defender's entry, no other than Sir Thomas Wallace, notwithſtanding all the proceedings, was veſted with the property; ſo that the preſent caſe is oppoſite to that of a ſingular ſucceſſor infeft. It is true, as the adminiſtration of his eſtate had been taken away from him, he could not then grant leaſes; but at the date of the preſent one he lay under no reſtraint, and as long as he continued undiveſted of his property, ſo long this leſſee had power to compel implement of his obligation over that property; and therefore the factor did voluntarily that only which, on application to the Court, he muſt have been ordered to do. In this reſpect the ſame rule obtained as if, prior to the ſequeſtration, the proprietor had entered into the contract of ſale; which doubtleſs the other contracting party might afterwards have completed by infeftment.

It is a miſtake to ſuppoſe, that in ſuch circumſtances creditors attain by the judicial factor a proper or excluſive poſſeſſion. He poſſeſſes for their behoof indeed, which is the meaning of the clauſe of ſtyle alluded to, but not leſs for the behoof of every other perſon intereſted, and particularly for that of the proprietor, their debtor; the purpoſe of the ſequeſtration, and of his poſſeſſing, being to preſerve the ſubjects from waſte, and by no means to vary or infringe the rights of the parties.

In the caſe of Lord Cranſton's creditors, it was an eſſential part of the leaſe reduced, to conſtitute to the tenant a real ſecurity for a large debt due by the landlord, and therefore it makes nothing againſt the defender's argument, that when not yet completed by poſſeſſion, this ſecurity was poſtponed to the real rights of other creditors previouſly eſtabliſhed by ſeiſin; while this argument is ſupported by the judgement of the Houſe of Lords pronounced in the queſtion between Dr Threipland and the Creditors of the York-buildings Company; 15th April 1779, *vid.* Fac. Coll. 7th July 1778.

The Court were much divided. Some of the Judges thought, that by the infeftments of the creditors, by the ſequeſtration, and by the poſſeſſion which the judicial factor had held, the connection between the proprietor and the eſtate was diſſolved, inſomuch that no poſſeſſion could follow on a title thus precluded. But others were clearly of opinion, and this ſentiment ſeemed to prevail, that the defender's argument was rightly deduced, from this conſideration, that Sir Thomas Wallace was as truly proprietor after as before ſequeſtration.

It is to be remarked, however, that as the tenant, prior to the ſequeſtration, had got from his landlord poſſeſſion of a couple of acres additional

additional to the farm, and which he was to enjoy along with it, this circumſtance had weight with ſome of the Court; that ſeveral other Judges conſidered a particular article of roup as barring the action; and that ſome were moved by an alleged homologation, founded on this, that the factor, when examined in the courſe of the proceſs of ſale, ſtated the terms of the leaſe, which was not objected to by the creditors; an argument much inſiſted on in the papers.

The Lord Ordinary "repelled the reaſons of reduction, and aſ-
" ſoilzied the defender."

On adviſing, however, a reclaiming petition and anſwers, the Court
" ſuſtained the reaſons of reduction."

This judgement being brought under review, the Court pronounced this interlocutor: "Alter the interlocutor reclaimed againſt, re-
" pel the reaſons of reduction, and aſſoilzie the defender."

To this judgment the Court afterwards finally adhered, on adviſing a reclaiming petition, with anſwers, &c.

Lord Ordinary, *Braxfield.* Act. *Blair, Mat. Roſs.* Alt. *Rolland, W. Miller.* Clerk, *Home.*

S.

N° CCXLIII. *December* 9. 1785.

ABRAHAM LESLIE,

AGAINST

ALICIA MACKENZIE.

JURISDICTION.—*Criminal acts ſubject to the cogniſance of civil courts,* ad civilem effectum.

A DEED granted by a perſon in favour of his ſtep-daughter was brought under reduction by his heir at law. One of the grounds of reduction was the plea of *turpis cauſa*, founded on the allegation of an inceſtuous commerce having ſubſiſted between the granter and the grantee. In bar of this plea, the defender objected, That as it amounted to an accuſation of a capital crime, it was ſubject to the cogniſance of the criminal juriſdiction alone, and ought not to be thus prejudicated by the interference of a civil court.

The

The Lords appointed a hearing in preſence on the merits of this objection; in ſupport of which, the defender

Pleaded: The law has not committed to the ſame judicatories, nor left to the ſame modes of procedure, the trial of criminal acts, and the cogniſance of civil affairs. The determination, therefore, of a civil court, reſpecting crimes, is not more a legal criterion of guilt, or of innocence, than is the ſuffrage of any private individual.

If, however, it be ſaid, that civil courts are competent to the trial of ſuch facts, even of a criminal nature, as are neceſſary to aſcertain civil rights, it may be obſerved, that though the diſtinction between the two kinds of juriſdiction were ſuppoſed to relate, not to the nature of the ſubject of cogniſance, but to that of the penal or patrimonial conſequence alone, a *præjudicium* at leaſt muſt ariſe from anticipating, by thoſe means, the legal inveſtigation of a criminal charge before the proper tribunal. To that mode of trial every accuſed perſon is intitled, and to all the advantages which attend it; but theſe could not fail to be greatly diminiſhed by the influence of a prior unfavourable deciſion, which, however erroneous, may have been paſſed on the matters in queſtion, by a court utterly incompetent to determi e on ſo important a ſubject.

In the Roman law, ſuch *præjudicium* was prohibited with reſpect to public crimes, or thoſe which intereſt the community at large; *l.* 4. *D. de Publ. judic.*; *Vinn. Comment. in Inſtit. ad tit. de Pub. jud. et tit. de vi. bon. rapt.* The ſame doctrine is eſtabliſhed in our own law, and has been exemplified in the accuſation of adultery; the civil court refuſing to take cogniſance of that crime, though for the ſole purpoſe of the plea of *turpis cauſa*, urged, as here, in bar of a claim of debt; Durie, 18th February 1624, Ferne *contra* Wiſhart's Heir. The caſe of aſſythment is an additional proof of the ſame principle. Though it is but a pecuniary claim, yet it cannot be eſtabliſhed, except ſentence has been given by the criminal court.

Anſwered: Cogniſance by a civil court, of matters which may infer a crime, taken in order to aſcertain rights of property, is quite independent of the trial of the crime in the criminal judicatory. Thus, in the civil courts, facts implying the crime of ſmuggling are daily judged of, for the purpoſe of annulling ſmuggling contracts; facts which infer bribery at elections of members of parliament, are likewiſe uniformly tried without the interference of any criminal court; thoſe too in which the crime of adultery conſiſts are brought to trial for the founding of the civil claim of damages; and divorces, after a proof of that crime, are decreed by the conſiſtorial, without the interference of the criminal court.

So totally unconnected, indeed, are the civil and the criminal juriſdiction, that if a perſon, after undergoing a trial in the criminal court, were even to be acquitted of the crime, this would not hinder parties intereſted to have the ſame facts brought under cogniſance, and eſtabliſhed by proof, in an action *ad civilem effectum*. The civil

reparation of aſſythment, it is true, is generally founded on a ſentence of the criminal court, becauſe there the capital crime from which it ariſes is commonly brought to trial; but were ſuch trial to be precluded by remiſſion, or any other cauſe, an action for aſſythment, in which the criminal matter might be aſcertained by proof, would lie in the civil court. The ſingle caſe of Ferne excepted, all the deciſions on the point ſhew, that *ad civilem effectum*, a criminal accuſation is cogniſable by the civil, altogether independent of the criminal judicatories. Durie, 20th July 1622, Weir *contra* Durhame; Fac. Coll. 26th June 1765, Sir William Hamilton *contra* Mary de Gares; Kilkerran, p. 495. Creditors of Buchanan *contra* Buntein.

The Court repelled the objection.

For Alicia Mackenzie, *Buchan-Hepburn.* Alt. *Lord Advocate.* Clerk, *Menzies.*

S.

N° CCXLIV. *December* 9. 1785.

JAMES CHEAP, and others,

AGAINST

Mrs AGNES FERGUSON.

SERVITUDE.—*Of paſturage, preſerved to one part of a barony, notwithſtanding the lapſe of the years of preſcription, by the poſſeſſion of the other parts.*

THE charters of the lands of Pitcullo, and ſeveral other lands, which were erected into a barony, contained the clauſe, '*Cum communi paſtura*;' and accordingly the paſturage of a neighbouring common was enjoyed by the poſſeſſors of all theſe lands. The uſe of that paſturage continued uninterrupted, except as to Pitcullo, the right belonging to which had not been exerciſed for more than forty years.

In a proceſs of diviſion of that commonty, this queſtion, therefore, occurred, Whether a ſervitude created to all the different parts compoſing a barony, but of which poſſeſſion had ceaſed in one part for the years of preſcription, could yet, from the union which barony implies, be preſerved as to that part, by the poſſeſſion maintained reſpecting the reſt.

On the affirmative ſide of the queſtion, it was

Pleaded:

Pleaded: Poſſeſſion of one part of a barony would preſerve the right of the other parts from being loſt by the negative preſcription. In the ſame manner, a ſervitude belonging to a whole barony indiſcriminately, will be ſaved from preſcription by the poſſeſſion connected with a part; 26th July 1765, Sir Robert Pollock *contra* Syme; Fac. Coll. 23d November 1757, Douglas *contra* Balfour.

Anſwered: The rule, *Tantum præſcriptum, quantum poſſeſſum*, is as applicable to ſubjects that compoſe a barony, as to any other. Poſſeſſion, therefore, of a ſervitude connected with one part of a barony, could not communicate a like right to the remainder. Neither can ſuch partial poſſeſſion have a different effect with reſpect to negative preſcription. Fac. Coll. 15th December 1752, Moncreiffe *contra* Balfour.

The Lord Ordinary repelled the objection founded on the want of poſſeſſion; and

The Lords adhered to that judgment.

Lord *Juſtice-Clerk* Ordinary. For Prop. of Pitcullo, *H. Erſkine*.
Alt. *Rolland, J. Anſtruther junior*. Clerk, *Orme*.

S.

N° CCXLV. *January* 16. 1786.

BARBARA BAIKIE,

AGAINST

ARTHUR SINCLAIR.

HERITABLE AND MOVEABLE.—*The annualrents due on a decreet of adjudication, go to the heir, and not to the executor, of the adjudger.*

THE ſame competition here occurred as in the caſe of Ramſay *contra* Brownlie, 1ſt December 1738, Kilkerran; where it was determined, "That the whole ſums contained in a decreet of adjudication, whether principal, annualrents, or penalties, belonged to the heir, and not to the executor of the adjudging creditor."

On this occaſion, the Court declined entering into a diſcuſſion of the queſtion, as a departure from a general rule, ſo ſolemnly eſtabliſhed, might be attended with bad conſequences.

"The Lords preferred the heir."

Lord Ordinary, *Gardenſton*. Act. *David Smyth*. Alt. *Tait*. Clerk, *Menzies*.

N. B.

N. B. The caſe of Willocks *contra* Auchterlony, decided in the Houſe of Lords, 30th March 1772, was much inſiſted on, in behalf of the executor, as a determination contrary to the principles formerly adopted. The Lords, however, conſidered that deciſion to have ariſen from a deſtination made by the adjudging creditor, which had the effect of altering the courſe of the legal ſucceſſion.

C.

N° CCXLVI. *January* 16. 1786.

GAVIN KEMPT,

AGAINST

HIS CREDITORS.

MEDITATIO FUGÆ.—*A warrant for incarceration, on that ground, may be put in execution at any time.*

GAVIN KEMPT, as being *in meditatione fugæ*, was committed to priſon, by a magiſtrate, on an application of his creditors. He afterwards preſented a bill of ſuſpenſion and liberation, in which it was argued, That the arreſt, having taken place on a Sunday, was illegal.

The cauſe was reported by the Lord Ordinary on the bills; when

The Court were unanimouſly of opinion, That as the impriſonment was founded on an alleged intention to *defraud* creditors, by flying to another country, it might proceed at any time.

The Lord Ordinary, after adviſing with the Lords, refuſed the bill.

C.

N° CCXLVII.

N° CCXLVII. *January* 17. 1786.

Mrs ELISABETH ROSE,

AGAINST

JAMES ROSE.

HEIR AND EXECUTOR.—*An heir-male intitled to relief, from the heir of line, of heritable debts ſecured on the ſucceſſion of both indiſcriminately.*

THE eſtate of Kilravock deſcended in part to Mrs Roſe, the heir of line; and in part likewiſe to James Roſe, the heir-male *. Certain debts of the family were contained in heritable ſecurities, affecting indiſcriminately both theſe portions of the eſtate. In an action, therefore, at the inſtance of the heir of line, againſt the heir-male, the queſtion came to be agitated, Whether ſhe ought to be relieved of a part of the debts correſponding to the proportion that the heir-male's ſucceſſion bore to the whole lands burdened. In defence it was

Pleaded for the heir-male: The heir-general, or of line, as the proper and primary repreſentative of the deceaſed in heritage, is alone liable for his heritable debts; while heirs of tailzie and of proviſion, who in the firſt inſtance are deemed ſingular ſucceſſors, are never ſubjected, except *ſubſidiariè* on the failure of the former. Nor in any caſe is a deviation from this rule of law to be admitted, without the moſt unequivocal expreſſion of will by the predeceſſor; and then, no doubt, a man may burden with the payment of his debts any of his ſucceſſors whom he chuſes. Kilkerran, *voce* Heir and Executor, Ruſſells *contra* Ruſſell, 23d January 1745, and Campbells *contra* Campbell, July 1747.

Our more ancient lawyers, Hope, for example, and Craig, agree in the doctrine, and the latter quotes a deciſion, by which it was directly found, That the heir of line is bound to relieve even an heir of tailzie from an obligation on the anceſtor to convey to another party the very tailzied ſubjects themſelves. *Jus Feud. lib.* 2. *dieg.* 17. § 19.; *Maj. Pract. voc.* Tailzie. Dirleton and Stewart likewiſe ſeem to entertain ſimilar ſentiments; Doubts, *voc.* Heir of Tailzie.

The opinion of Lord Stair is, That where a burden has been laid on particular lands or rights, *and no other*, in that ſingle caſe, the heir of the ſpecial ſubjects is obliged to relieve the heir-general, b. 3. tit. 5. § 17.; an opinion which, though perhaps not quite conform-

* Vid. page 239. *ſup.*

able to the above, is equally favourable to the defender's plea; for here no burden is laid on his particular lands, *and no other*, but as making a part of the eſtate in general along with thoſe which devolve to the heir of line. On this ground, then, which is likewiſe agreeable to the opinions of Lord Bankton, (b. 3. tit. 5. § 70.), and of Erſkine, (b. 3. tit. 8. § 52.), the preſent argument reſts. The utmoſt effect of ſuch a catholic burden, like that of renouncing the benefit of diſcuſſion, is to give creditors immediate acceſs to the heir-male's ſucceſſion, without firſt attaching that of the heir of line.

The oppoſite doctrine is ſuch a novelty, that it cannot be diſcovered in the records of the Court; nor have the form of proceſs and mode of judicial proof been yet deviſed, by which that proportion of debt which correſponds to the comparative values of ſucceſſion, dividing between ſpecial and general heirs, may be regulated or aſcertained.

Anſwered: When it is admitted, that heirs-male cannot claim relief of debts ſecured on their lands if thoſe of the heirs-general be not likewiſe impignorated, the rule of law concerning the repreſentation of the anceſtor being thus departed from, the queſtion at iſſue is really given up. For if the heir-male alone is liable, and the burden on him is total, when his lands only are affected, why ſhould the burden ceaſe altogether, inſtead of becoming partial and proportional, when it ſtill lies upon his property, though it extends alſo to that of the heir-general?

Let one of two debts be ſuppoſed to burden the ſucceſſion of the heir-male, and the other the ſucceſſion of the heir of line; then, *ex conceſſis*, the heir-male will be liable for the firſt, in the ſame manner as the heir of line is for the ſecond. Now if theſe two ſeparate debts of the anceſtor be thrown into one, ſo as to affect *pro indiviſo* the whole ſucceſſion, general and ſpecial, what conceivable reaſon is there for exempting on this account the heir-male altogether, and ſubjecting totally the heir of line? Or if a ſecurity granted over the heir-male's ſucceſſion only, were ſuppoſed to be afterwards extended at the deſire of the creditor over that of the heir-general, could any rational cauſe for ſuch a conſequence be then aſſigned?

To ſay only, that an effect ſimilar to the privilege of creditors againſt the order of diſcuſſion will be thus produced, is no more than a begging of the queſtion. In all the caſes alike, a burden is laid on the eſtate of the heir-male, under which it deſcends to him. The will of the defunct, it is true, was ſufficient to regulate on what portion of his ſucceſſion the load of his debts ſhould fall; and it is thus that intention is moſt unerringly expreſſed. For though a man giving real ſecurity to his creditor may be ſuppoſed to have for his object the procuring of money rather than the ſettlement of his ſucceſſion; yet if in fact he does ſettle it in a legal manner, as he is not to be preſumed ignorant of the law, nor unconſcious of his own act, the concluſion muſt neceſſarily be, that if his purpoſe had not been conſiſtent with the deed done by him, he would in expreſs terms have guarded againſt ſo obvious a hazard.

The

The cauſe was reported by the Lord Ordinary, when the Court pronounced this interlocutor:—"Find, That where the heritable debts "are ſecured upon the eſtates deſcendible to the heir of line, and alſo "upon the eſtates deſcendible to the heir-male of the late Kilravock, "the heir-male is by law intitled to a total relief of theſe debts from "the heir of line."

This judgment having been brought under the review of the Court, by petition and anſwers; and the Bench being then much divided, a hearing in preſence was appointed; after which

The Lords adhered to their former interlocutor.

Reporter, *Lord Rockville.* Act. *Wight, G. Fergusſon.* Alt. *Lord Advocate, Rolland, Blair.* Clerk, *Menzies.*

S.

N° CCXLVIII. *January* 24. 1786.

The HERITORS in the Pariſhes of MELROSE and STITCHELL,

AGAINST

The HERITORS in the Pariſh of BOWDEN.

POOR.—*Poor children, who have not reſided three years in any pariſh, how to be maintained.*

JOHN ROBSON, after having reſided more than three years in the pariſh of Bowden, removed to that of Melroſe, where one of his children was born. He afterwards reſided for a year in the pariſh of Stitchell, in which place his wife bore him another child.

John Robſon died ſoon after in great poverty; ſo that the queſtion occurred, Whether the pariſh of Bowden, in which he had acquired a ſettlement, or thoſe of Melroſe and Stitchell, in which his children were born, were liable to their maintenance?

For the heritors of Melroſe and Stitchell it was

Pleaded: The pariſh in which a pauper has reſided for the three years immediately preceding his poverty, and not that of his birth, has been found, by the later deciſions, to be burdened by law with his maintenance. This is founded on the act 1672, and in the reaſon of the thing; the expence occaſioned by the poor being thereby devolved on that diſtrict, the inhabitants of which had been laſt benefited, in any conſiderable degree, by their induſtry; Kilkerran, 6th June 1755, Pariſh of Dunſe; Fac. Coll. 7th Auguſt 1767, Pariſh of Crailing;

Crailing; Fac. Coll. 28th July 1779, Heritors of Coldingham *contra* Thoſe of Dunſe; Ibid. 14th June 1781, Waddel *contra* Heritors of Hutton.

The aliment due to the children of a pauper, who are not to be conſidered ſeparately from himſelf, muſt be regulated in the ſame manner. It would indeed be moſt unreaſonable, that on a father's becoming indigent, his children ſhould be diſperſed among all thoſe pariſhes in which they happened to be born. Beſides the inhumanity of ſuch a regulation, the benefit of paternal admonition and example would in this way be loſt, while the expence of ſupporting the children would, on the whole, be conſiderably increaſed.

Anſwered for the Heritors of Bowden: The rule adopted in the inſtances above referred to is inadmiſſible in the preſent caſe, where the poor perſons have not reſided for the requiſite ſpace of time in any pariſh. Hence, therefore, the pariſh of the birth, as the primary and general place of ſettlement, can alone be liable.

The inconveniencies which have been figured to ariſe from this cannot have any weight. It is not indiſpenſably neceſſary that the children ſhould reſide in the pariſh from whence they derive their ſupport.

The ſheriff-depute of the county had found the pariſhes of Melroſe and Stitchell liable reſpectively in the maintenance of the children born in the ſaid pariſhes, "in reſpect the children had not reſided "three years in any other pariſh."

A bill of advocation was preferred, which was refuſed by the Lord Ordinary. And after adviſing a reclaiming petition, with anſwers, the Lords affirmed theſe judgments

Lord Ordinary, *Monboddo.* For the Pariſhes of Melroſe and Stitchell, *A. Fergusſon.*
For that of Bowden, *Claud Boſwell.*

C.

N° CCXLIX. *January* 24. 1786.

ROBERT GORDON,

AGAINST

ANDREW MELLIS.

PRISONER. Act of ſederunt 1671.—*The temporary enlargement of a priſoner on a* meditatione fugæ *warrant, falls not under it.*

A DEBTOR of Gordon's was impriſoned in conſequence of a warrant obtained againſt him as *in meditatione fugæ.* Mellis, the jailor, having permitted the priſoner to go at large for a ſhort while, but

but without any neceſſity, he was ſued by Gordon in an action, founded on the act of ſederunt of 14th June 1671.

The purſuer *pleaded:* This act of ſederunt, which declares, "That magiſtrates of burghs, who ſhall permit any perſon incarcerated for debt to go out of priſon, except in extreme danger of his life from the confinement, ſhall be liable for the debt," is applicable to the caſe in queſtion.

Anſwered: The object of impriſoning for a debt already conſtituted, is to compel payment by means of the *ſqualor carceris*; and when a debtor ſo impriſoned is unneceſſarily enlarged for ever ſo ſhort a period, without his creditor's conſent, the latter being ſo far deprived of his legal compulſatory, is no doubt intitled to ample indemnification. But the purpoſe of this impriſonment is merely to ſecure the priſoner's appearance in judgement, which the liberty given him has no tendency to endanger. Of conſequence the act of ſederunt cannot relate to circumſtances like the preſent.

The Lord Ordinary having decerned againſt the defender,

The Court altered that judgment, and aſſoilzied the defender.

Lord Ordinary, *Hailes.* Act. *Corbet.* Alt. *Maconochie.* Clerk, *Menzies.*

S.

N° CCL. *January* 25. 1786.

GENERAL SKENE,

AGAINST

GEORGE SANDILANDS.

MEMBER OF PARLIAMENT.—*A huſband, during the lifetime of his wife, has right to vote in virtue of her infeftment, though ſhe be not an* heireſs.

THE proprietor of the lands of Nuthill, having four daughters, diſponed his eſtate to the eldeſt; who, after her father's death, took infeftment on the diſpoſition, and obtained a charter of confirmation from the Crown. She afterwards married Mr Sandilands, who, in virtue of the titles above mentioned, was admitted among the freeholders of the county of Fife.

General Skene, a freeholder in that county, complained to the Court of Seſſion of this inrolment, and

Pleaded: The right of voting at elections, in virtue of a wife's infeftment, belongs excluſively to thoſe who have married *heireſſes*. Mr Sandilands has thus aſſumed a privilege to which he has no right, his wife's eſtate having accrued to her by ſingular titles. By the rules of ſucceſſion, it would have divided between her and her ſiſters equally.

This diſtinction, between the huſbands of thoſe who enjoy a landed eſtate, by purchaſe, or by inheritance, as it flows from feudal principles, was naturally adopted into the ſtatutes relative to elections. Though not ſo diſtinctly marked by that of 1681, it is explicitly recogniſed in the after one of Queen Anne, enacting, "That no huſ-"bands ſhall vote at any enſuing election, in virtue of their wives "infeftments, who are not *heireſſes*, or who have not right to the "property of the lands on account whereof ſuch vote ſhall be "claimed."

It might, indeed, at firſt ſight appear, from the latter part of the clauſe already recited, that the huſbands even of women who hold the property of lands by purchaſe, were admitted to the privilege of voting. But the ſtatute, ſo interpreted, would be inconſiſtent with itſelf. The meaning of the legiſlature certainly was, not only to confine this right to the huſbands of heireſſes, but alſo to impoſe an additional reſtriction, among this claſs, with regard to thoſe whoſe wives had only a limited right, and not the abſolute property of the eſtates to which they had ſucceeded; Fac. Coll. 1ſt February 1781, Sir John Paterſon *contra* Ord.

Anſwered: The obligation to attend the King's baron-courts was a natural conſequence of holding a feudal eſtate of the Crown: and though, with regard to fiefs poſſeſſed by women, this duty, from motives of delicacy, was underſtood, while they remained ſingle, to be virtually paſſed from by the Sovereign; yet during their coverture it devolved on their huſbands, who, as they enjoyed the whole advantages of the lands, were juſtly called to perform this and the other preſtations of vaſſalage. From the ſame principle it aroſe, that as the huſband of an heireſs was, by the cuſtom of Scotland, intitled, even after his wife's death, to draw the rents of her eſtate in virtue of the courteſy, ſo his obligation to perform the feudal ſervices ſtill continued; and it was only when the wife had not taken her eſtate by deſcent, but had acquired it by other methods, that her huſband, as in the caſe of Ord *contra* Paterſon, being, after her demiſe, excluded from poſſeſſing the lands, was at the ſame time releaſed from the duties he formerly owed.

Our ancient law has not in this reſpect ſuffered any eſſential alteration. By act 1681, the right of being inrolled as a freeholder is communicated to huſbands, for "the *freeholds* of their wives, *or* having "right to a liferent by the courteſy." And by 12th Queen Anne, every huſband indiſcriminately is allowed to vote, if his wife is either

an

an heireſs or the *proprietreſs* of a freehold of the requiſite valuation, holding of the King or Prince. The latter part of this clauſe was thrown in to prevent the creation of occaſional votes on the eve of an election; as it was foreſeen, that, without a limitation of this ſort, liferent or defeaſible eſtates would be given to wives, in order to qualify their huſbands to vote.

It was farther urged for Mr Sandilands, That his wife, with reſpect to an eſtate deſcending to her from her father, though in conſequence of a deed *inter vivos*, was to be conſidered as an heireſs. This argument, however, was unanimouſly diſregarded by the Court; it being evident, that Mrs Sandilands, in the courſe of ſucceſſion, would have been intitled only to a partial intereſt in the lands.

The Lords diſmiſſed the complaint, and found expences due.

For the Complainer, *Dean of Faculty*. Alt. *Wight*.

C.

N° CCLI. *January* 27. 1786.

WILSON, GREGORY, and COMPANY,

AGAINST

JOHN OLD.

FACTOR.—*A factor receiving a ſubject from his conſtituent, though it be certified to belong to another perſon free from any claim of retention, is bound to account to the conſtituent, and not to the owner.*

A Mercantile houſe in Scotland tranſmitted to Old, their factor in the Weſt Indies, a quantity of goods for ſale on commiſſion. The goods were aſcertained to him as belonging to Wilſon, Gregory, and Company, and as being exempted from any claim in behalf of his conſtituents for commiſſion-premium, or for freight. In conſequence of a demand afterwards made by the owners, he promiſed to remit to them the proceeds of the ſale; which, however, he having failed to do, they, on his return to this country, inſtituted an action againſt him. In defence, he alleged that he had accounted for thoſe proceeds to his conſtituents; and

Pleaded: It is to his conſtituent alone that a factor is bound to render an account. Other perſons, indeed, may have an intereſt in the ſubject of the factory; but to that he is not bound to pay any regard beyond the limits of his inſtructions.

Anſwered:

Anſwered: If it is certified to a factor, that the ſubject of his factory belongs to a perſon againſt whom, as in the preſent caſe, neither he himſelf nor his conſtituent has any claim, his detaining ſuch property, contrary to the will of the owner, is equally wrongful, as if, without the interpoſition of the former, he had received it immediately from the hand of the latter.

The Lord Ordinary found, That the factor was bound to render an account to his conſtituents alone; and

The Court adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Stonefield*. Act. *Morthland, W. Steuart*. Alt. *A. Campbell*. Clerk, *Home*.

S.

N° CCLII. *February* 1. 1786.

Mrs SARAH DALRYMPLE,

AGAINST

CHARLES SHAW.

PACTUM ILLICITUM—*if a perſon ſtipulates a benefit to himſelf, or to another, for obtaining for a third an office from government.*

Whether an office may be lawfully procured to one perſon for the behoof of another, by agreement between them.

MRS DALRYMPLE purſued Shaw in an action of declarator, for having it found, That as, at the ſolicitation of her friends, the office of keeper of the regiſter of ſeiſins for the county of Ayr had been obtained for him by the member of parliament for that ſhire, on a condition ſtipulated by her, of his paying to her, and her children after her, five ſixth-parts of the fees and emoluments of that office; ſo he was now bound to fulfil that condition. When the cauſe came to be adviſed, this queſtion was ſuggeſted, Whether ſuch a paction was *contra bonos mores*, and ſo not actionable. Afterwards, in ſupport of the objection, the defender

Pleaded: The ſtipulation in queſtion is inconſiſtent with the nature of a public office. The ſalaries or emoluments pertaining to ſuch, are not to be deemed merely adequate to the ſervice performed, but conſtitutionally requiſite to preſerve to the public officer that degree of independence, and that rank in life, which are ſuited to the extent of the truſt committed to him. In another view, it is virtually a bribe received,

received, or a corrupt bargain entered into for the procurement of an office of public truſt; a thing reprobated by expreſs ſtatute in England, 12th Richard II. chap. 2. as it is by the ſpirit of our common law, the abuſe not ſeeming to have ever riſen ſo high in this country as to demand the ſpecial interpoſition of the Legiſlature. In a caſe ſimilar to the preſent, action was denied on the principles now ſtated. Fac. Coll. 9th February 1759, Young *contra* Thomſon.

Anſwered: The ſtatute quoted, and others poſterior, ſuch as 5th and 6th Edward VI. cap. 16. afford proof, that by the common law of England the ſale of public offices was not *malum in ſe;* otherwiſe thoſe enactments would have been ſuperfluous. Nor is there any reaſon to ſuppoſe our own common law different in that reſpect. The caſe of Young and Thomſon muſt have been decided on ſome other ground than that of *pactum illicitum;* ſince of two tranſactions to which that objection was equally applicable, one only was annulled by the judgment of the Court. In fact, nothing is more openly ſold than are public offices every day; the clerkſhip of the High Court of Juſticiary, for example, the depute-clerkſhips of the bills, the ſheriff-clerkſhips.

The Court were agreed, That it is *contra bonos mores*, and illegal, for thoſe in power, procuring from government offices to other people, to ſtipulate a ſum of money, or any of the emoluments, either to themſelves, or to third parties. Some of the Judges thought the preſent caſe ſubſtantially of the ſame nature; while others ſtrongly urged this diſtinction, That here the member of parliament bore no part in the tranſaction in queſtion; and as there is nothing wrong in obtaining a public office from favour to a particular individual or family, ſo it muſt be right to do ſo in the manner beſt ſuited to the beneficent end propoſed.

It became unneceſſary, however, to decide the cauſe on that general ground; the evidence of the alleged ſtipulation having been found inſufficient. But as the defender declared his willingneſs to grant a part of the purſuer's demand; to that extent

The Lords decerned againſt him.

Reporter, Lord *Rockville.* Act. *Dean of Faculty.* Alt. *Blair, Corbet.* Clerk, *Home.*

S.

N° CCLIII. *February* 1. 1786.

MARGARET and MARY MACRA,

AGAINST

The PRINCIPAL of the COLLEGE of ABERDEEN, and others.

TESTAMENT.—*How far the Mortmain ſtatute of 9th* Geo. II. *c.* 36. *extends to ſettlements made in Scotland, with regard to money inveſted in the Britiſh funds.*

ALEXANDER MACRA, a native of Scotland, executed a deed in this country, whereby he diſponed his effects, conſiſting of monies inveſted in the public funds, to the Principal of the College of Aberdeen, and others, as truſtees.

His chief object was, to provide a fund for the maintenance and education of poor children of the name of Macra. And by the ſettlement, in which he reſerved to himſelf a power of altering, the truſtees were directed to diſpoſe of his effects, and to lay out the proceeds in purchaſing land in Scotland.

Margaret and Mary Macra, his ſiſters, and neareſt in kin, inſiſted, after his death, in an action, for ſetting aſide this ſettlement. In particular, they contended, That it fell under the act 9th Geo. II. c. 36.; and

Pleaded: To prevent conveyances of property in mortmain, which are ſo incompatible with the intereſts of a commercial nation, and at the ſame time ſo injurious to the kindred of thoſe who chuſe in this manner to diſpoſe of poſſeſſions which they can no longer enjoy, it has been provided, " that no alienation of land, or transference of perſonal eſtate, or of money in the public funds, for uſes called charitable uſes, ſhould be validly made, unleſs the granter be thereby irrevocably diveſted, in the caſe of real property, twelve months, and with regard to other effects, ſix months prior to his death."

It was indeed at the ſame time declared, " That nothing in the act " contained ſhould extend, or be conſtrued to extend to the diſpoſi- " tion, grant, or ſettlement, of any eſtate, real or perſonal, *lying* or " *being* within that part of Britain called Scotland." But this tends rather to ſtrengthen than to invalidate the purſuers plea. The framers of the law muſt have underſtood, that its operation, without ſuch a clauſe, was not to be confined to England alone; and the exception being reſtricted to effects locally ſituated in Scotland, the enactment here muſt have its full effect, agreeably to the rule, *Exceptio firmat regulam, in caſibus non exceptis.*

Anſwered:

Answered: The statute of the late King was only intended to regulate the proceedings of Englishm en with regard to effects situated in their native country; Bankton, b. 4. tit. 1. § 16. The expressions it uses, such as, "manors, advowsons, hereditaments," &c. are purely English. The methods too of authenticating the settlements by "deeds "indented, signed, and sealed," are peculiar to that nation; and the necessity of recording them in the English court of Chancery never could be intended to be imposed on persons having their residence where that Court possessed no authority.

To extend the enactment to the effects of foreigners, because locally situated in England, would diminish the value of our national funds, without adding to our commerce. Nor can the efficacy of deeds made in Scotland, especially by a Scotsman, and conveying an estate to be settled in that country, be different from that of those which are executed in a foreign country, or by foreigners while resident in England. For though the public or national rights of a Scotsman, and of a native of England, are now the same; yet the municipal regulations of their respective countries are equally independent of each other, as before the Union of the two kingdoms. The limitation, therefore, occurring in this statute having been quite unnecessary, every inference from the inaccurate manner in which it has been expressed must be unsatisfactory and inconclusive.

It was separately contended for the pursuers, That the devise was invalid, as being in favour of the Principal of the College of Aberdeen, and of other persons, distinguished only by their employments, such as the dean of guild, and the eldest bailie of that town; because these persons constituted no corporation, which could maintain actions, or hold landed property in perpetual succession. The objection, however, was over-ruled by the Court. The same method of conveyance, it was observed, had been often practised in Scotland, as in the case of Heriot's, of Watson's, and other hospitals.

The Lords sustained the defences, thus giving effect to the settlement in question.

Lord Reporter, *Henderland.* Act. *Wight, Mat. Ross.* Alt. *Buchan-Hepburn.*
Clerk, *Home.*

C.

N° CCLIV.

N° CCLIV. *February* 2. 1786.

ANDREW DOWIE,

AGAINST

ALEXANDER MILLIE.

BILL OF EXCHANGE.—*A legacy cannot be effectually conſtituted in that form.*

THE father of Alexander Millie accepted a bill of exchange drawn by Andrew Dowie, his ſon-in-law; who, in an action for payment, judicially acknowledged, that the purpoſe of the deceaſed in this tranſaction was to create a teſtamentary bequeſt in favour of his daughter.

The queſtion being, Whether a deed of that nature could be ſo executed; it was contended in behalf of the purſuer, That ſince the ſtatute of 1772, ſhortening the endurance of theſe documents, there was not ſuch danger to be apprehended from extending their uſe as in former times; Fac. Coll. 2d December 1782, Adam *contra* Johnſton.

The Lords, however, found, "That the bill in queſtion was a *do-*
" *natio mortis cauſa*, and that a donation conſtituted in the form of a
" bill is not a valid deed by the law of Scotland."

Lord Ordinary, *Hailes.* Act. *Durham.* Alt. *Nairne.* *Cloquhoun*, Clerk.

C.

N° CCLV. *February* 5. 1786.

WILLIAM ROSS,

AGAINST

JAMES MONTEATH, and others.

TACK.—*Bygone rents unpaid, an inſeparable burden on an aſſignment to a leaſe.*

A Tackſman of lands aſſigned his leaſe to certain perſons, as truſtees for his creditors. Theſe truſtees having entered into the poſſeſſion, were ſued for payment of the rents of two years antecedent to the aſſignment in their favour.

The

The Lord Ordinary found, That by accepting the aſſignation the defenders had ſubjected themſelves to payment of the arrears of rent then due.

A reclaiming petition being preſented to the Court, it was held to be perfectly clear, that thoſe arrears were a burden inſeparable from the right to the leaſe; and therefore

The petition was refuſed without anſwers.

Lord Ordinary, *Alva.* For petitioners, *Cullen.*

S.

N° CCLVI. *February* 7. 1786.

CHARLES SALTER,

AGAINST

The FACTOR on the Sequeſtrated Eſtate of KNOX and COMPANY.

MOVEABLES.—*How far, by the meaſuring out of goods, without farther delivery, the property is tranſmitted.*

ON 13th December 1785, Charles Salter paid to Knox and Company L. 63 Sterling, as the price of ſixty bolls of malt, to be afterwards delivered.

On 2d February following, Knox and Company gave notice to Charles Salter, that the ſtipulated quantity of malt had been then meaſured and ſet apart for him.

A few days after, however, Knox and Company ſtopped payment. The factor on their ſequeſtrated eſtate took into his poſſeſſion the whole malt found in their warehouſes; and Charles Salter petitioned the Court of Seſſion, that the ſixty bolls, for which he had paid, might, as his property, be delivered up to him. He

Pleaded: The actual delivery of moveables, from hand to hand, is not in every caſe eſſential to a tranſmiſſion of the property. Where the price has been paid, or even *ubi fides habita eſt de pretio*, it has been found, that any act, expreſſive of the ſeller's deſign to diveſt himſelf, is ſufficient for this purpoſe. Thus even ſymbolical delivery has been ſuſtained, in a queſtion with one who had afterwards attained the natural poſſeſſion; —— 1762, Gray *contra* Cowie. And, in expreſs terms, it has been decided, that the weighing out of fungibles, whether the price has been paid or not, was equivalent to an immediate

diate ſurrender of the property; Fount. 27th July 1710, Main *contra* Maxwell.

Anſwered: The general rule of law is undoubted, that *Traditionibus, non modis pactis, dominia rerum transferuntur.* It is true, that in ſpecial circumſtances our cuſtoms have introduced certain modes of ſymbolical tradition, wherein ſomething elſe is delivered as repreſenting the ſubject intended to be conveyed; Erſkine, b. 2. tit. 1. § 19. It is likewiſe true, that delivery may be effected without the perſonal intervention of the purchaſer, as in the inſtance referred to, of goods weighed out in the public office to the purchaſer's wife, and afterwards marked with the initials of his name; in which caſe, as well as in thoſe where ſymbolical tradition is allowed, the ſeller has no longer any power over the ſubjects ſold. The preſent caſe, however, is very different. That no ſymbolical tradition took place, muſt be admitted. It is equally plain, that no actual delivery was made, either to the purchaſer, or to any one in his behalf. The goods ſtill remained, as before, in the cuſtody, and under the adminiſtration of the original owners. They might have been, by voluntary conveyance, transferred to a third party; they might have been attached by poinding at the ſuit of individual creditors; and the ſequeſtration which followed gave to the whole creditors a right equally broad.

The Court were unanimous in rejecting this claim. It was obſerved by one of the Judges, That a purchaſer had indeed an equitable claim to goods of which he had paid the price; but however equity may afford relief, by *undoing* what has been illegally done, it cannot, in a queſtion with third parties, ſupply the want of thoſe things which, though required by the law, have been left *undone*.

The Lords refuſed the petition.

For the petitioner, *Dean of Faculty.* Alt. *Maclaurin.*

C.

N° CCLVII.

N° CCLVII. *February* 7. 1786.

Sir MICHAEL STEWART, Baronet,

AGAINST

WILLIAM MITCHELL.

CAUTIONER,—*in a ſuſpenſion, whether intitled to reſile before his ſecurity has been admitted by the charger.*

WILLIAM MITCHELL ſigned a bond, as cautioner in a ſuſpenſion offered by a tenant of Sir Michael Stewart's; but his ſecurity not being thought ſufficient, the bond was, in common form, delivered to the ſuſpender's agent, for the purpoſe of getting it atteſted. Two different atteſtations were ſucceſſively offered, but not accepted; and in the mean time the ſuſpender became notoriouſly inſolvent. Sir Michael Stewart, the charger, then inſiſted for delivery of the bond; and

Pleaded: The ſecurity offered, though not judged fully adequate, was not, however, finally rejected. Neither can it be reaſonably imagined, becauſe the charger was deſirous of the collateral warranty of an atteſter, that he had it in view, if that could not be had, to renounce altogether the right he had already acquired. A contrary doctrine, indeed, would be full of injuſtice: For if, inſtead of allowing the ſuſpender to procure additional ſecurity, the cautioner had been peremptorily refuſed, a certificate of caution not being found, might have been obtained; and by means of immediate diligence, the charger might have had an opportunity of recovering payment, which is now altogether precluded.

Anſwered: The interpoſition of a cautioner in ſupenſions, is viewed, in practice, merely as an *offer*, from which, at any time before its being accepted by the clerk of the bills, the party *offering* is at full liberty to recede. Hence, when his ſufficiency is doubted, the bond ſigned by him is invariably returned, without any receipt, to the perſon by whom it is preſented. Nor has the charger any reaſon to complain of this; becauſe it is in his power, at any time after the day aſſigned by the Lord Ordinary, to extract the certificate, and ſo to proceed to the execution of his diligence.

The Lords found, That the cautioner was not bound.

Lord Ordinary, *Rockville.* Act. *Maclaurin.* Alt. *Cullen.*

C.

N° CCLVIII.

N° CCLVIII. *February* 8. 1786.

[TEIND-COURT.]

The EARL OF KINTORE,

AGAINST

The UNITED COLLEGE of ST ANDREW'S.

TEINDS.—*In a valuation, deduction is not allowed of additional rent paid on account of exemption from multures.*

IN a proceſs of valuation of teinds, brought by the Earl of Kintore againſt the College of St Andrew's, he claimed a deduction from his rental of a part of the rent, as being paid by the tenants in conſideration of his relieving them from a multure *of the ſixteenth peck*; the knaveſhip only, which was *the thirty-third peck*, being exacted for the labour of grinding; for that the additional land-rent was merely a ſubſtitute for the mill-rent, which was not a teindable ſubject.

The Court, after adviſing memorials on the cauſe, allowed the deduction. But that judgment being brought under review by petition and anſwers, a hearing in preſence was ordered.

Pleaded for the Titulars: The chief reaſon why multures are not a teindable ſubject, is, that they are the price of perſonal labour; ſo that tithes of them would be perſonal, and not predial; Bankton, b. 2. tit. 8. § 153.; Erſkine, b. 2. tit. 10. § 32. But it is plain, that this principle applies to ſuch reaſonable multures only as are an adequate price for the work performed; and therefore, in ſtrict propriety, the exceſs ſhould be tithable; or, which is the ſame thing, the portion of mill-rent correſponding to the exceſs of multure, ſhould be ſo, ſuch rent being compoſed of the multures.

The preſent mode of claiming exemption is peculiarly dangerous to the titular. A landlord thus, after agreeing with his tenant to receive a large part of his rent in an extravagantly high multure, has nothing more to do, in order to defraud the titular, than, upon having his land-rent replaced as before, to alledge, that ſo great a proportion of it was in lieu of multures. What adds to the injury is, that here an invariable deduction is claimed; whereas that founded on an actual mill-rent is, by its nature, ſubject to change and diminution. Accordingly a ſimilar claim of deduction was rejected by the Court, in the caſe of Sinclair of Mey *contra* Sinclair of Freſwick, 14th January 1784.

Anſwered:

Answered: The argument of the defenders amounts to this, That no deduction from a rental ought to be allowed on account of multure, but for knaveship alone; a position equally new and erroneous, and which pays no regard, either to the original expence of the mill and its machinery, or to the constant charge of keeping them in repair. It is plain, that as mill-rent arising from dry multure is as much deducible as any other rent, so it can make no difference whether the mill-rent be paid at once by the miller, or in sundry portions by the tenants, in the manner adopted in this case.

This conclusion is verified by an uniform series of decisions: Heritors of Calder *contra* College of Glasgow, 30th July 1735; Sir John Maxwell *contra* College of Glasgow, 5th December 1744; Minister of Cuskney *contra* Heritors, 15th July 1752; Dalzell of Glenae *contra* Duke of Queensberry, 14th February 1753; Earl of Aboyne *contra* King's College of Aberdeen; Lord Monboddo *contra* Officers of State, 24th June 1772; Straton of Kirkside *contra* Officers of State, 16th February 1774. The case of Sinclair of Mey was not judged upon the general point, but governed by this speciality, That from peculiar circumstances a tack had been granted at a very low rent, and the titular requiring, that it should be totally laid aside, or at least that no deduction from the rental should be made, the Court, *ex equitate*, gave sanction to the latter alternative.

The Court altered their former interlocutor, and repelled the claim of deduction.

Act. *Lord Advocate* and *Wight.* Alt. *Blair, M'Cormick.*

S.

N° CCLIX. *February* 16. 1786.

WILLIAM MORRIES, and others,

AGAINST

JOHN WILSON, and others.

PACTUM ILLICITUM. VIS ET METUS. Act 16th Geo. II. cap. 11. 14th Geo. III. cap. 81.—*The payment, by one political party, of an elector's debts, in order to counteract the designs of the opposite party, who had instigated the creditor to the execution of ultimate diligence, not construed as bribery and corruption.*

IN a complaint under the statutes of the 16th of Geo. II. cap. 11. and 14th Geo. III. cap. 81. against an election of magistrates and council of the burgh of Dumfermline, it was

Objected: That the votes of certain perſons had been obtained by means of *bribery and corruption:* for that, they being utterly bankrupt and under ultimate diligence, their debts had been paid by the political party in favour of which they had given their voice. To this objection it was

Anſwered: That the creditors of thoſe voters had been inſtigated by the oppoſite party to execute that diligence, in order to prevent them from exerciſing their right of election; and therefore that ſuch payment of debts was juſtified by the reſtoring of electors to a ſtate of freedom, of which, from ſiniſter motives, they had been deprived.

The Court, adopting the argument of the reſpondent,

"Repelled the objection, and diſmiſſed the complaint."

Act. *Abercromby, Maconochie.* Alt. *Wight, Cullen.* Clerk, *Menzies.*

S.

N8 CCLX. *February* 16. 1786.

PATRICK TAYLOR,

AGAINST

AGNES KELLO.

PROOF—*of Marriage.*

AGNES KELLO, the daughter of a farmer, and poſſeſſed of a conſiderable fortune for one of her rank, received the addreſſes of Taylor, a perſon of equal condition, but who, by extravagance, had reduced himſelf to bankruptcy, and was unacceptable to her relations.

Having drawn up the following writing, he gave it to her, who made a copy of it, which ſhe ſubſcribed, thus: "*Skirling Mill,* "*February* 16. 1779. I hereby ſolemnly declare you, Patrick Taylor "in Birkenſhaw, my juſt and lawful huſband: and remain your "affectionate wife, AGNES KELLO." This written declaration ſhe delivered to him, and received from him another, *mutatis mutandis,* in the ſame terms.

Taylor afterwards continued as formerly to viſit Agnes Kello, at her mother's houſe; but there was no ſufficient evidence of *concubitus;* though it has been ſince affirmed by the former, notwithſtanding the denial

denial of the latter. In the meanwhile, he employed the interceſſion of ſome of his relations to urge the mother's conſent to a regular celebration of marriage; which was then without effect. The above writing, however, he kept ſecret from every one, even from thoſe confidential perſons themſelves; nor was it ever heard of till the mother happened to diſcover the tranſcript of it that was in her daughter's poſſeſſion, when it was immediately deſtroyed. The latter then wrote to Taylor, requiring him to reſtore that copy which ſhe had given to him.

He refuſed to comply with this demand; but his viſits were ſtill repeated: and in ſpring 1780 proclamation of bans between him and Agnes Kello was at length conſented to, and twice made; but before the third time, it was ſtopped by her or her relations. For two years after this period, their meetings had become very unfrequent; and from 1782 to 1784, theſe ceaſed altogether; inſomuch that they had not ſeen each other during twenty-one months.

In the laſt-mentioned year, Agnes Kello was about to be married to another perſon, when Taylor inſtituted againſt her an action of declarator of marriage.

The Commiſſaries pronounced the following ſentence: "In reſpect "it appears that the defender, when arrived at an age when, by the "law of Scotland, ſhe was deemed capable of conſent, voluntarily "and deliberately granted to the purſuer the delaration libelled on, "and received from him a counter declaration of the ſame import; "find the mutual obligations relevant to infer marriage between the "parties; and find them married perſons accordingly."

A bill of advocation againſt this ſentence having been refuſed by the Lord Ordinary, Agnes Kello, in a reclaiming petition,

Pleaded: The writing in queſtion did not import conſent *de præſenti*, but merely an intention of marrying at a future period. The parties, from their education and principles, were not likely to have in contemplation any marriage that was not regular and ſolemn; and their after conduct, particularly as to the proclamation of bans, evinces their ſenſe of no actual marriage having taken place. The words themſelves of the writing have not legally that import, being almoſt the ſame as, without any ſuch meaning, are employed in all antenuptial contracts of marriage; Erſkine, b. 1. tit. 6. § 3.

But even conſent *de præſenti*, if given *remotis arbitris*, and unaccompanied by celebration, by cohabitation, or by conſummation, is inſufficient to conſtitute marriage. Such is not the *conſenſus qui facit matrimonium;* Kames's Elucid. p. 29.; *l.* 5. *ff. De rit. nupt.; l.* 22. *C. De nupt.*; Dirleton, *voc. Sponſalia;* Bankton, vol. 3. p. 60. 61.; Select Deciſ. 29th June 1756, Cameron *contra* Malcolm.

Anſwered: The authorities which have been adduced to prove that conſent *de præſenti* is not of itſelf effectual for conſtituting marriage, do in truth all relate to *ſponſalia*, where the conſent is *de futuro;* while the

the contrary is the eſtabliſhed doctrine; Stair, b. 1. tit. 4. § 6.; Erſkine, b. 1. tit. 6. § 1. And as to the import of the writing, no words ſurely more expreſſive of conſent could have been employed by the parties, than thoſe declaring themſelves to be each other's *juſt and lawful huſband and wife.*

The Court were divided. Some of the Judges, (*concubitus* being held to be out of the queſtion) conſidered the writing, as meant by the defender, to ſignify her willingneſs merely to enter into a regular marriage with the purſuer; a conſtruction ſaid to be enforced by the received notions of people of that claſs. Beſides the circumſtances noticed by the defender, the purſuer's not having attempted, needy as he was, to avail himſelf, as the defender's huſband, of her fortune, which that relation would have put in his power, was underſtood to indicate ſtrongly his ſenſe of there being no marriage. A majority, however, of the Court, independently likewiſe of conſummation, thought, agreeably to the judgment of the Commiſſaries, that the marriage was ſufficiently eſtabliſhed by the terms of the writing. At the ſame time, there were ſuſpicions concerning conſummation which did not ſeem to be altogether diſregarded.

The Court adhered to the interlocutor of the Lord Ordinary, refuſing the bill of advocation.

Lord Ordinary, *Braxfield.* Act. *C. Hay.* Alt. *Mat. Roſs.* Clerk, *Sinclair.*

Event on appeal S.

N° CCLXI. *February* 21. 1786.

The HERITORS of the Pariſh of CAIRNEY,

AGAINST

The MODERATOR and other MEMBERS of the Preſbytery of STRATHBOGIE.

MANSE.—*A manſe may be declared ſufficient in terms of the act* 1663, *though not built at the ſight of the preſbytery.*

THE miniſter's manſe in the pariſh of Cairney having become ruinous and inſufficient, a new one was built by the heritors, without any application to the preſbytery of Strathbogie, in whoſe bounds it was ſituated.

Afterwards the heritors inſiſted that it ſhould be viſited, and declared

red ſufficient by the preſbytery, to the effect of obliging the incumbent, in terms of the act 1663, to uphold it during his office.

The preſbytery refuſed a viſitation, and

Pleaded: It is only where a manſe has been built under the authority of the preſbytery, that the heritors are intitled, by the ſtatute 1663, to demand a viſitation, and to devolve on the miniſter the expence of ſuch repairs as may be afterwards needed during his incumbency; and it ſeems reaſonable that this ſhould be the caſe. If the preſbytery have not an opportunity of concerting the plan and ſituation of the building, they ought not to be made reſponſible for the ſuitableneſs of its accommodation; and without beſtowing ſome attention on the progreſs of the work, they muſt be very ill qualified to judge whether it has been properly performed.

Anſwered: Though, when a miniſter is not furniſhed with a proper habitation, preſbyteries be authoriſed to take the neceſſary meaſures for ſupplying that deficiency, it does not follow, that the incumbent is only compellable to fulfil the obligation impoſed on him by the ſtatute, where his manſe has been erected under their immediate inſpection. The reaſons too which have been ſuggeſted for introducing ſuch a regulation are quite unſatisfactory. If the building as conſtructed by the heritors is in any manner defective, or if its ſituation has been judiciouſly choſen, the incumbent may object, and the preſbytery may refuſe their approbation. But where no exception can be offered, it were ſurely moſt unjuſt, that the heritors, who have voluntarily given obedience to the law, ſhould, on that account alone, be forfeited of their right to demand reciprocal performance.

The cauſe was reported by the Lord Ordinary, when the Court, in pretty ſtrong terms, expreſſed their diſapprobation of the plea here maintained by the preſbytery; and it was propoſed by one of the Judges, to name perſons of ſkill to inſpect the building.

The Lord Ordinary therefore remitted to the preſbytery to proceed in the viſitation.

Lord Reporter, *Ankerville.* Act. *Solicitor-General.* Alt. *W. Robertſon.*

C

N° CCLXII. *March* 3. 1786.

HELEN INGLIS,

AGAINST

ALEXANDER ROBERTSON.

PROOF—*of Marriage.*

MR ROBERTSON, a merchant of ſome conſideration, was ſued in an action of declarator of marriage, by Helen Inglis, a ſervant-girl, with whom he had formed a connection. He had taken her from her ſervice, put her to ſchool, and maintained her, during an intercourſe that ſubſiſted uninterrupted for *fourteen years.*

In that time he addreſſed many letters to her, under the appellation of *his dear wife*, ſubſcribing himſelf *her loving huſband;* made her preſents of a gold watch, gold rings, his father's and mother's miniature pictures, and other ſuch like articles; was frequently ſeen to behave towards her with the affectionate and reſpectful manner of a huſband; and, on one occaſion, when in company with him ſhe was drunk to as his wife, he ſeemed to aſſent to that mode of addreſs.

On the other hand, it did not appear from the evidence, that they were conſidered by thoſe around them to cohabit as huſband and wife; while it was proved, that ſhe at different times, towards the cloſe of their correſpondence, with ſolemn imprecations, declared that ſhe had never had any carnal communication with him; and, in particular, that ſhe did ſo to a clergyman, previouſly to her being admitted to the ſacrament.

In an action of declarator, which was inſtituted by Helen Inglis upon Robertſon's entering into another marriage, and in his defence againſt which he did not deny *concubitus*,

The Commiſſaries pronounced this ſentence: "Find facts, circumſtances, and qualifications proven, relevant to infer a marriage between the purſuer and defender."

On a bill of advocation being preſented by the defender, the Lord Ordinary took the cauſe to report; when it was

Obſerved on the Bench: The defect in the proof of cohabitation in this caſe, proceeds in ſome meaſure from the witneſſes aſcribing the intercourſe between the parties to a cauſe ſuggeſted by the diſparity of their

their rank. That defect is therefore to be ſupplied by other circumſtances, ſuch as the ſo frequent writing of letters by the defender to the purſuer, his making preſents to her of valuable family-articles, and his aſſent to the addreſs made to her on the occaſion mentioned above.

The Court conſidered the cauſe as attended with conſiderable difficulty; but, in general, the letters ſeemed to be viewed as furniſhing evidence of the marriage.

The Lords refuſed the bill of advocation.

Reporter, Lord *Gardenſton.* Act. *Rolland.* Alt. *Maconochie.*

S.

N° CCLXIII. *March* 3. 1786.

WILLIAM SHAW,

AGAINST

DUNCAN MACDONELL, and others.

MUTUAL CONTRACT.—*A literary work having been anounced in propoſals for publiſhing by ſubſcription, as conſiſting of different parts, the ſubſcribers found free from their engagement, ſome of thoſe not being executed.*

SHAW gave out propoſals for publiſhing, by ſubſcription, a literary work, which he deſcribed as follows: "A Dictionary of the "Gaelic and Engliſh, and Engliſh and Gaelic languages; together "with a Gloſſary of proper names of men and things, and Accounts "of battles, warriors, affinities and feuds between great chiefs and "clans; with Deſcriptions of mountains, rivers, vallies, iſlands, &c. "in Scotland; proper references being made to the Welſh and other "ancient dialects of the Celtic."

The book, however, was publiſhed without any attempt having been made by the author to fulfil that part of his propoſals reſpecting the Gloſſary, the hiſtorical accounts, or the references. In conſideration of theſe defects, and of alleged imperfections in thoſe parts of the propoſed work which were executed, ſeveral of the ſubſcribers returned the copies delivered to them, and refuſed payment of the price.

Shaw having on that ground inſtituted an action againſt them,

The Court conſidered the author's total failure in performing a part of the work anounced in his propoſals, as ſufficient to liberate

berate the ſubſcribers from their engagement to him; at the ſame time that the allegation of the other parts of the book being leſs perfectly executed than was to have been expected, did not, ſo far as *mala fides* or groſs negligence was not implied, appear to be deemed a relevant defence.

The Lords therefore aſſoilzied the defenders.

Reporter, Lord *Swinton*. Act. *Solicitor-General et Tait*. Alt. *J. Grant, W. Campbell*. Clerk, *Orme*.

S.

N° CCLXIV. *March* 9. 1786.

ABRAHAM DELVALLE, and others,

AGAINST

The CREDITORS of the YORK-BUILDINGS COMPANY.

PRESCRIPTION.—*The Scottiſh preſcriptions, how applicable to Engliſh debts.*

THE Undertakers for raiſing Thames Water in York-buildings, a company of Engliſh merchants erected by letters-patent in the reign of Charles II. were afterwards incorporated by an act 2d and 3d of William and Mary.

So early as the year 1719, they purchaſed landed property, both in England and Scotland, to a great extent. They iſſued a variety of bonds, which were conceived in the Engliſh form; but before 1732, their eſtates were covered in ſuch a manner with annuities preferably ſecured, and other real incumbrances, that their bonded creditors were unable to recover payment.

At length, about the year 1777, moſt of the annuities having terminated by the death of thoſe to whom they were due, a ſale of the lands in Scotland belonging to the Company, and a competition of its creditors, took place.

The vicennial limitation of the law of England, ariſing from the ſilence of the creditor for ſo long a period, was firſt urged, and repelled; "in reſpect, from the ſpecial circumſtances of the caſe, there "was no room for a preſumption of the debts having been paid by "the Company."——It was next queſtioned, how far the Scotch preſcription of forty years could be applied to debts like the preſent, contracted in England, by an Engliſh company, and due to Engliſhmen.

The

The creditors to whoſe debts the objection was made

Pleaded: The municipal laws of Scotland, in relation to contracts, are not applicable, in any ſhape, to thoſe which have been entered into in a foreign ſtate. Hence bonds completed after the Engliſh manner, though deſtitute of the ſolemnities requiſite in Scotland, are every day ſuſtained in this country. So alſo as to the tranſmiſſion of obligations: Thus bonds, and other written documents, though incapable of being transferred in Scotland by blank indorſation, may yet, where the parties reſide in England, be held effectually conveyed in that manner. In the extinction, too, of obligations, the ſame maxim prevails. In this country, a debt conſtituted by bond cannot be diſcharged without writing: but with regard to ſuch a debt, contracted in England, witneſſes will be admitted, even in the Scotch courts, to prove payment. Dict. *voc.* Foreign; Fac. Coll. 31ſt January 1783.

The propriety of thoſe deciſions is evident. All agreements ought, according to the dictates of natural juſtice, to be binding and effectual, where they have proceeded from the deliberate will of the parties, and have been proved to the conviction of the judge before whom action is brought. As this, however, would give riſe to an infinity of frauds and diſputes, the uſe of particular ſolemnities has been made neceſſary; and where thoſe forms have been introduced, a perſon living under the ſame government, who afterwards neglects to frame his ſtipulations in a legal manner, has himſelf to blame if his purpoſe is fruſtrated. Nay, ſince parties are always underſtood, in their agreements, to have regard to the law of the country in which they reſide, it is reaſonable enough to preſume, in the caſe of informal deeds, that a more effectual obligation was not intended. But it never could be in the view of any legiſlature to regulate, by enactments of this ſort, the proceedings of men not ſubject to its authority. And it would be the ſource of manifeſt injuſtice: for as the ſolemnities of contracts are every where various, a debtor might thus elude, by mere change of place, the beſt founded claims.

The ſame reaſoning ought to be deciſive of the preſent queſtion. The ſupreme power of a ſtate may require creditors to make their demand within a limited time, otherwiſe to be forfeited of their right. This is founded on expediency, and many equitable conſiderations unite in ſupporting it. In countries where ſuch limitations have been introduced, they may well be deemed, after the expiration of the ſtatutory period, to operate on the part of the creditor as an implied renunciation of his claim; but to extend ſuch a rule, preſcribed for the ſubjects of one kingdom, to thoſe of another, would be tyrannical and unjuſt. It would be to bind men, under a heavy penalty, to the obſervance of a law of which they are altogether ignorant. The preſcriptions eſpecially, of the law of Scotland, the effect of which is not merely to preclude action, but to produce a total abolition of debt, can never be enforced with regard to contracts which are ſtill obligatory in the country where they were originally conſtituted. No determination of a Scotch court can procure ſuch a releaſe to an Engliſh debtor, whoſe perſon and eſtate in England muſt ſtill remain liable

to attachment. It would only prevent his effects ſituated in Scotland from being applied to their firſt and moſt equitable uſe, the payment of his debts, or enable him, by a fraudulent removal, to defeat the juſt demands of his creditors.

In particular caſes, indeed, the limitations impoſed by our law may with propriety be extended to foreign contracts. Where a perſon, having his domicile in Scotland, has entered into obligations, while occaſionally in England, or where an Engliſhman, after contracting debt, has retired to this country with his whole effects, little hardſhip can ariſe from ſuſtaining the preſcription of Scotland, at leaſt as a ſtrong preſumption of payment or dereliction, even againſt Engliſh creditors; becauſe the ſituation of the debtor muſt have led them, if their claims were well founded, to make theſe effectual according to the law of the place where alone they could expect payment. And on this principle the deciſions which have rejected foreign claims on account of the Scottiſh limitations, muſt have proceeded. It alſo might be admitted, that in the direct tranſmiſſion of property, as well as in the forms of proceeding for the recovery of debts, either by attachment of the perſon or eſtate of a debtor, the law of the place where the property is ſituated, or where execution is demanded, is to be ſtrictly obſerved. But the obligation itſelf, or the right of action, ſtands on a footing extremely different.

Anſwered for the creditors in general: Proceedings in courts of juſtice muſt ever be governed by thoſe rules which have been eſtabliſhed by the power from whence the judges derive their authority; which alone they are bound to know, and to which every party who commences a ſuit before them, muſt be underſtood to ſubmit the trial of his claim. *Voet. lib.* 1. *tit.* 4. *pars* 2. § 5. 8. *De ſtatutis.*

One reſtriction only of this general principle occurs with regard to the *ſolemnities* of contracts, whether for originally *conſtituting* obligations, for *transferring* them when conſtituted from one perſon to another, or for finally *extinguiſhing* them. In order to preſerve an equal intercourſe between the individuals of different nations, it has been determined in Scotland, as well as in all other civilized ſtates, that the want of thoſe forms which are required in the country where execution is demanded, ſhall not render invalid an agreement which would have been effectual in the country where it was entered into.

But in every other queſtion, either with reſpect to the *efficacy* or *extent* of covenants executed in a foreign country, the law of Scotland has been in our courts invariably followed. Thus, where a bond had been granted in Ireland, containing an obligation to pay intereſt at the rate of 10 *per cent.* as allowed in that kingdom, our Judges gave decreet only for thoſe ſums which could have been legally ſtipulated for the uſe of the money in Scotland. So likewiſe, where it was pleaded, in the caſe of an Engliſh debt, that it could not in that country have affected the *heir*, but the *executor* alone, judgment was nevertheleſs pronounced, finding the heir liable; Fount. 27th January 1710, Philip Savage *contra* Mr Robert Craig; Kilkerran, 10th July 1739, Fullerton *contra* Kinloch.

The

The Scottiſh conſtitutions in particular, which limit the endurance of actions, have been uniformly extended to claims founded on contracts executed in foreign countries. It would indeed have been ſingular, if regulations intended to repreſs frauds in the raiſing up of forged and antiquated claims, ſhould be altogether ineffectual when they were moſt wanted; when to the difficulty of detecting offences of this ſort, ariſing from diſtance of *time*, that of *place* was ſuperadded; Voet. lib. 1. tit. 8, § 30.; Erſkine, book 3. tit 7. § 48.; Principles of Equity, p. 125. 283.; 7th July 1755, Truſtees of Renton *contra* Baillie; 13th July 1768, Randal *contra* Innes; 20th February 1771, Ker *contra* The Earl of Home; 4th February 1772, Barret *contra* The Earl of Home.

It is of no conſequence that in this manner the effect of contracts will be different in different countries. This occurred in all the caſes above referred to; and muſt unavoidably happen in thoſe of infinitely greater moment, unleſs all nations were to agree in one common ſyſtem of juriſprudence. Till that period arrives, it is enough that deeds executed in a foreign kingdom, are, in Scotland, ſuſtained in the ſame manner as thoſe of the like nature framed according to the rules preſcribed in this country; and in the circumſtances of the preſent caſe, where the debtors, during the ſtatutory period, not only had a proper *forum* in this country, in which they might have been ſued, but were all the while poſſeſſed of large eſtates in Scotland, which might have been attached by their creditors, every plea of hardſhip which might occur in particular inſtances ſeems altogether precluded.

The Court were very much divided in opinion on this point. After a judgment had been pronounced, ſuſtaining the objection, the cauſe was for ſome time delayed, in expectation of the creditors obtaining decreets in England againſt the Company; by which, it was admitted, the plea of preſcription would be removed. In this, however, the creditors failed; for which it was given as a reaſon, that the diſtribution of the Company's funds having been by an act of parliament intruſted to the Court of Seſſion in Scotland, the Engliſh courts declined to interfere.

Upon adviſing a reclaiming petition, therefore, with anſwers, the Lords adhered to their former judgment.

Lord Ordinary, *Monboddo*. For Abraham Delvalle, *Lord Advocate, Wight, Craig*. For the Creditors in general, *Mackintoſh, Buchan-Hepburn, Elphinſton, Blair*. *Colquhoun*, Clerk.

C.

N° CCXLV

N° CCLXV. *March* 9. 1786.

ABRAHAM DELVALLE, and others,

AGAINST

The CREDITORS of the YORK-BUILDINGS COMPANY.

PERSONAL AND REAL.—*An aſſignee to an Engliſh bond, transferable by indorſation, is affected by the frauds of his authors.*

THE bonds iſſued by the York-buildings Company being payable to one of the clerks, or his aſſigns by indorſement, paſſed from hand to hand by blank indorſation.

In 1731, after the affairs of the Company had gone into diſorder, ſome of the bonds were given away in payment at a conſiderable diſcount, while others were depoſited in ſecurity of ſums greatly below their value; a proceeding which gave occaſion to a parliamentary inquiry, and to ſeveral ſuits in the civil courts in England, againſt the managers of the Company.

Many of theſe laſt-mentioned bonds, however, having been tranſferred from the original holders, at the ſame price which the other ſecurities of this Company yielded at the time, the queſtion occurred, Whether the preſent poſſeſſors were to be ranked for the whole ſums in the bond, or only for thoſe truly received by the Company.

For the creditors to whoſe debts the objection was applicable, it was

Pleaded: The bonds in queſtion being made negociable by blank indorſation, the public was authoriſed to believe, that no exception which did not appear from the document itſelf could be available againſt the holders. Nor would it be at all juſt, that thoſe who fairly acquired them, according to their current value, ſhould thus ſuffer from defects occaſioned by the frauds of former poſſeſſors.

Nothing indeed is more uſual than to expoſe to ſale at an under value the bond of ſuch a bankrupt company as this. Nor was it ever imagined that the claim of the purchaſers was to be reſtricted to the ſums truly paid. The bonds here objected to, accordingly, have in England been viewed in this light. The complaints which were preferred in the houſe of Commons, and the proſecutions entered in the civil courts in England, would have been quite ſuperfluous if in no caſe thoſe obligations could be effectual for more than the Company actually received.

Anſwered

Answered for the creditors in general: No assignee to a claim of debt, the case of bills of exchange alone excepted, can, by the law of Scotland, stand in a different situation from that of the persons from whom his right was originally obtained, or through whose hands it has passed; Erskine, b. 3. tit. 5. § 10. And the law is the same in England, where the usual form of assigning is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the debt; Blackstone, vol. 2. b. 2. chap. 30.

Neither is it of importance that the bonds of this company were negotiable by indorsation. In this manner the *mode* of transference was indeed rendered more easy and expeditious; but the *right* transferred, especially in a question not with the company itself, but with its competing creditors, never could be thought more extensive: and although such bonds, issued by a public company, as have once regularly gone into circulation, may be afterwards legally transferred, at a price below the sums originally drawn for them, it does not from thence follow, that they can be at first issued at an under value. This never can take place, unless from gross mismanagement or fraud; and the consequences of either must be alike fatal to every one whose rights are derived from those accessory to it.

By one interlocutor, the Lords found, "That the bonds of this "company, being passable and negotiable by indorsation, by the spe-"cial nature thereof, so long as they continued personal, without "any diligence being led thereon, the present holders thereof, who "purchased for a valuable consideration, though under the amount "of the sums in the said bonds, are intitled to be ranked for the full "contents thereof, notwithstanding the said bonds may have origi-"nally been pledged or deposited as a security for sums below their "amount, or issued originally by the company, without any just or "true value being paid for the same."

But after advising a reclaiming petition, with answers, the following judgment was pronounced.

"Find, That the holders of the bonds in question must be consi-"dered as assignees; and that every objection competent against the "cedent is also competent against the assignee; and therefore find, "That the holders of these bonds can only be ranked for the sums "really and truly advanced to the York-buildings Company."

Lord Ordinary, *Monboddo.* For Abraham Delvalle, *Lord Advocate, Wight, Craig.*
Alt. *Buchan-Hepburn, Elphingston, Blair.* Clerk, *Colquhoun.*

C.

N° CCLXVI. *March* 8. 1786.

LILLIAS BALD,

AGAINST

JANE BUCHANAN.

CONSOLIDATION—*of property and ſuperiority not effected* ipſo jure, *or without reſignation* ad remanentiam.

PRESCRIPTION,—*on what title pleadable.*

HEIR-APPARENT,—*whether he can tranſmit by ſucceſſion the right of obtaining confirmation by a ſuperior.*

SUPERIOR AND VASSAL.—*Whether a conveyance of property along with ſuperiority, granted by the ſuperior, who had only the* dominium directum, *and accepted by the vaſſal, be valid as to all other parties.*

PRior to 1705, Archibald Buchanan of Drummakiln ſtood infeft in theſe lands, and in thoſe of Cameron, all holding then of ſubject-ſuperiors.

In 1705, he obtained the ſuperiority of Cameron, by a diſpoſition, which, it is to be remarked, comprehended likewiſe the property, excepted however from the clauſe of warrandice.

In the ſame year he executed a deed, conveying the lands of Cameron, and aſſigning the diſpoſition from the ſuperior, in favour of himſelf in liferent, and of William, and a certain ſeries of heirs, in fee; reſerving to himſelf full powers to alter, burden, or diſpone. By virtue of the procuratory contained in the diſpoſition thus aſſigned, reſignation having been made in the hands of the Crown, a charter in the terms of this conveyance was paſſed under the great ſeal; and upon it infeftment followed.

In 1730, Archibald, in the marriage-contract of his ſon William, diſponed to him, and a ſeries of heirs ſomewhat different from that in his former diſpoſition, the whole lands above mentioned; granting procuratory and precept. William took infeftment on the precept; but did not execute the procuratory.

William, who never entered into the poſſeſſion, predeceaſed his father; leaving a ſon, Archibald, and a daughter, Lillias. He was likewiſe ſurvived by a brother, Robert.

The laſt-mentioned Archibald, the younger, made up titles to Cameron, by ſpecial ſervice, as heir-male to William, his father, and by infeftment on a precept from chancery; and to Drummakiln, by ſeiſin in virtue of precepts of *Clare conſtat*, which he obtained as heir to his grandfather, Archibald the elder.

On the death of Archibald the younger, the ſucceſſion devolved to his

his uncle Robert, who likewiſe made up titles as his heir by ſpecial ſervice in the lands of Cameron, and precept of *Clare conſtat* in thoſe of Drummakiln.

Robert executed an entail of the whole eſtate in favour of Jane Buchanan, his natural daughter.

Of this entail Lillias Bald, the daughter of Lillias Buchanan, as heireſs at law of William, inſtituted a reduction on the following ground: That, by infeftment on the precept contained in the marriage-contract, William was veſted with the *dominium utile* of the whole lands; and that the ſuperiority of Cameron, which he held under the diſpoſition dated in 1705, had never been conſolidated with the property; for which reaſons the titles of Archibald the younger had been erroneouſly made up to Drummakiln, as if *in hæreditate jacente* of Archibald the elder; and equally ſo to the *dominium utile* of Cameron, ſince the bare ſuperiority only could be carried by the infeftment on the precept from chancery; and conſequently that the titles of Robert, the entailer, were alſo inept.

With reſpect to the lands of *Cameron*, there were three ſeparate defences ſtated: *Firſt*, That the two fees were *conſolidated ipſo jure; ſecond*, That otherwiſe *preſcription* would have had the effect of uniting them; and, *third*, That by confirmation the *baſe* fee might, at any rate, be ſtill rendered *public*.

1*mo*, The defender *pleaded*: The ſuperiority was in the perſon of William *conſolidated* with the property *ipſo jure*. The *dominium directum*, as the name imports, is originally and primarily the right of property; the *dominium utile* no more than a burden laid on that right by an obligation in favour of the vaſſal. Of conſequence, when both theſe *dominia* unite in the ſame perſon, the obligation conſtituting the burden, like all other obligations in the event of *concurſus*, is extinguiſhed *confuſione*; or, in other words, the *dominium utile* is *ipſo facto* conſolidated with the *dominium directum*.

It is true, that, for the ſecurity of third parties, ſuch conſolidation ought not to take place, if the acquiſition from which it proceeds be not made known by the public records; although our more ancient lawyers did not regard this precaution; thinking even a perſonal right to the property acquired by the ſuperior ſufficient, without regiſtration, for an *ipſo facto* conſolidation; Spottiſwoode, *voc.* Superiors; Durie,——Supplicant, 21ſt June 1634; Fountainhall, 23d July 1687, Ellis. This error, however, was corrected when the important uſes of the records came to be more attended to; and a mere perſonal right was no longer held ſufficient; but in order to conſolidation, it became requiſite that the ſuperior's right to the property ſhould be perfected by ſeiſin. Dallas's Styles, p. 567.

As ſoon, therefore, in ſuch a caſe, as the ſuperior takes ſeiſin, to which regiſtration is eſſential, his ſuperiority, *eo ipſo*, is conſolidated with the property. In this matter our lawyers ſeem to be agreed. Dirleton indeed treats it among his Doubts, *voc.* Conſolidation; but it is only as to the propriety of a ſuperior giving ſeiſin to himſelf, which at that period was much queſtioned. Lord Stair, too, ſtates

infeftment

infeftment by the ſuperior as the only thing neceſſary for conſolidating in his perſon the property with the ſuperiority; b. 2. tit. 2. §7. b. 3. tit. 2. § 23. And to thoſe opinions the general practice of the country has been conformable.

It is likewiſe admitted, that when the two rights happen to be deviſed to different ſets of heirs, this may be an obſtacle in the way of conſolidation *ipſo facto*, as indeed it may indicate a contrary intention in the author; though, as Dirleton obſerves, prior to the actual diviſion of ſucceſſion, a kind of conſolidation will ſubſiſt, *loc. ſup. cit.* A reſignation *ad remanentiam*, therefore, may be deemed neceſſary to hinder the eventual ſeparation: and this is all which is meant by the obſervation of Lord Bankton, b. 2. tit. 2. § 12. or by that of Mr Erſkine, b. 3. tit. 8. § 81. But in the preſent caſe the heirs under the diſpoſition in 1705, and under the contract of marriage in 1730, are truly and ſubſtantially the ſame.

After all, perhaps, the above argument may be deemed ſuperfluous. By the charter which the ſuperior granted in 1705, both property and ſuperiority are conveyed jointly as one fee. Now, it is evident, that as to all the world, except the vaſſal, the full right to a feudal ſubject is in the ſuperior; and to his unlimited diſpoſal of it the vaſſal alone is intitled to object. In ſuch diſpoſal, in the preſent inſtance, the vaſſal, by his own act, has formally acquieſced. That charter, therefore, is to be regarded as the ſource of Archibald the elder's right; and thus the fees, not being ſeparated, do not require or admit conſolidation.

Anſwered: There is no ground for the plea of *conſolidation*. The ſuperiority and the property of lands are in their nature ſeparate eſtates of fee, and as ſuch may be held by different tenures. Seiſin is eſſential to the tranſmiſſion of both, as reſignation *ad remanentiam* is to the extinction of one by its being ſunk in the other. The indiſpenſable neceſſity of theſe forms is eſtabliſhed; Craig, *lib.* 3. *dieg.* 1. §6.; Stair, p. 351.; Bankton, vol. 2. p. 145.; Erſkine, p. 287. 288. And the propriety of them, in preventing *ipſo jure* conſolidation, is evident from ſeveral examples; ſuch as, thoſe of property holding feu uniting with the ſuperiority ſubject to wardholding, and of an unlimited property being conſolidated with an entailed ſuperiority.

It is true, an incongruity was at one period imagined in the idea of a ſuperior's giving infeftment to himſelf; and without firſt infefting himſelf, he could not reſign *ad remanentiam*. Other expedients, however, were propoſed; ſuch as, decreets of conſolidation, and retours, expreſſing that the property was to be conſolidated with the ſuperiority *ad perpetuam remanentiam*; all of which tend to ſhow, that conſolidation was never underſtood to take place *ipſo jure*. In this manner, the more ancient authorities quoted appear to be really adverſe to the defender's doctrine.

In the preſent caſe, the argument againſt *ipſo jure* conſolidation is enforced by ſpecialties. 1. William obtained the ſuperiority by infeftment on the crown-charter in 1706. Archibald, his father, continued his

his vaſſal. In 1731, William took a baſe infeftment from his father, thus creating an intermediate ſuperiority in the perſon of the latter. This mid-fee, then, is an impediment which muſt prevent the union of the paramount ſuperiority and the property. 2. The deſtination of ſucceſſion in the charter is different from that in the contract of marriage. 3. It is abſurd to ſuppoſe an intention in William to conſolidate the unlimited property with a ſuperiority ſubject to revocation.

As for the ſuppoſition of the two fees being united in the ſuperior's diſpoſition, not even the moſt expreſs and formal deed, under the hand of the vaſſal, could have the effect to extinguiſh or convey the feudal right that is in him; much leſs his implied, or even expreſs conſent to a deed of the ſuperior.

Pleaded: 2*do*, The neceſſity of reſignation *ad remanentiam* would, at any rate, be here ſuperſeded, and the union effected, by *the poſitive preſcription.* A charter and infeftment, purporting in terms a full conveyance of lands, though intended to convey the ſuperiority only, is nevertheleſs a good title for the preſcription of the property; for after preſcription has taken place, there is no room left to inquire what may have been the original nature of the title. Wallace's Coll. 22d December 1774, Earl of Dunmore *contra* Middleton; Select Deciſ. 7th February 1766, Miller *contra* Dickſon.

Anſwered: William's poſſeſſion is not to be aſcribed to the charter, as that was a defeaſible right, but to the contract, which veſted him with the abſolute property; otherwiſe preſcription, inſtead of *adjectio dominii*, would become *detractio dominii.* Beſides, if the heir under one of the titles had right to plead poſſeſſion on that footing, the heir under the other title might urge a ſimilar claim. But, in fact, the poſſeſſion of Archibald muſt be underſtood as held by virtue of the infeftment of property, agreeably to the deciſions in a variety of ſimilar caſes; Kames, 26th January 1726, Marquis of Clydeſdale *contra* Earl of Dundonald; Kilkerran, 30th June 1752, Smith and Bogle *contra* Gray; 22d November 1768, Kempts *contra* Ruſſell.

Replied: If a perſon has held a ſubject under two titles, either he himſelf or his ſucceſſors may attribute his poſſeſſion to one or other of them as they chooſe. Here the crown-charter and infeftment formed a ſufficient preſcriptive title; and it is abſurd to ſuppoſe, that it ſhould become inſufficient, in conſequence of another equally good title exiſting along with it. Indeed, after the courſe of the long preſcription, every document judged eſſential to the right is preſumed to have been taken, and of courſe reſignation *ad remanentiam* will, if deemed neceſſary, be here preſumed to have been made, and the inſtrument to have periſhed by the injury of time.

Pleaded: 3*tio*, Though William did not indeed execute the procuratory contained in his contract of marriage, and the infeftment taken by him is accounted *de me;* yet he had *the right of obtaining*

the ſuperior's confirmation, which would render the holding public. This right has been tranſmitted by ſervice ſucceſſively to Archibald younger and Robert, and to the defender by the entail in queſtion. By expeding confirmation, therefore, ſhe can at once obviate the plea of the purſuer.

Anſwered: With reſpect to the *dominium utile* of Cameron, both Archibald II. and Robert died in the ſtate of apparency; ſo that having no right to that fee, they could tranſmit none by ſervice; and the right of confirming belongs only to the perſon who takes the *baſe* fee Beſides, the general ſervice alluded to was in the character of heir-male, which plainly could not carry the right of an heir of proviſion under the marriage-contract; Dict. vol. 2. p. 345.; 21ſt July 1738, Edgar *contra* Maxwell; Fac. Coll. 10th March 1784, Roſe *contra* Roſe. And farther, could it have carried the procuratory, it would ſtill not have reached to the property, a ſpecial ſervice and infeftment being neceſſary to this; ſo that nothing but a mere blanch ſuperiority under the contract would have been tranſmitted.

Replied: A ſervice as heir to a ſpecific ſubject includes every character in which the party may ſucceed to ſuch ſubject; Rem. Dec. 21ſt June 1749, Bell *contra* Carruthers and Dormant; and therefore in this caſe the character of heir-male would comprehend that of heir of proviſion.

With reſpect to the lands of *Drummakiln*,

The defender *Pleaded:* The poſſeſſion held by Archibald the elder, combined with that of Archibald the younger, and of Robert, have extinguiſhed the infeftment of William. After the contract of marriage in 1730, on which infeftment was taken by William only, who never attained poſſeſſion, theſe lands continued ſtill to be poſſeſſed by Archibald the elder, whoſe title of poſſeſſion, and which only, if called to it, he could have produced, was the old infeftments which he had obtained from the ſubject-ſuperiors. On that title he, together with Archibald the younger, and Robert, who connected themſelves with it ſucceſſively by ſervice, having held the poſſeſſion for more than forty years poſterior to the date of the contract, without any regard to the infeftment which followed on it, the title is now ſecured by the poſitive preſcription, and cannot be affected by the laſt-mentioned infeftment.

Nor can it be juſtly objected, That as Archibald the elder's liferent was reſerved by the contract, his poſſeſſion ought, in conſiſtency with that deed, to be aſcribed to thisliferent-right, and conſtrued as the poſſeſſion of the fiar. For the preſcription pleaded tends to give full effect to the deſtination of ſucceſſion created by the contract; and thus, inſtead of being adverſe to it, is its ſupport.

Anſwered: To preſcribe againſt his own obligation, which was contained in the marriage-contract, would have been fraudulent in Archibald

chibald the elder. In fact, he did it not, as his liferent-right was his only title of poſſeſſion, and therefore his was, in the conſtruction of law, the poſſeſſion of the fiar; as was found in the caſe of Dundonald, quoted above. But, at any rate, the poſitive preſcription would not avail, unleſs the negative could alſo be pleaded againſt the obligation in the contract of marriage, the rendering of which effectual the purſuer is intitled to inſiſt on againſt every repreſentative of Archibald the elder, or of his heirs.

Replied: There is no neceſſity for pleading the negative preſcription of the obligations in the marriage-contract, under which the purſuer can have no *jus crediti*, being only an heir-whatſoever. That contract has already had full effect in favour of Archibald the younger, and of Robert.

The cauſe was taken to report by the Lord Ordinary; and the Court appointed a hearing in preſence.

The following interlocutor was afterwards pronounced:

" The Lords having reſumed conſideration of the mutual informa-
" tions, and having heard parties procurators thereon, they ſuſtain
" the reaſons of reduction."

And to that judgement, on adviſing a reclaiming petition, with anſwers, the Court adhered, by the following interlocutor:

" Find, That the ſuperiority of Weſter Cameron, veſted in the per-
" ſon of William under the infeftment 1705, and the property, veſted
" in his perſon under the infeftment 1730, remained ſeparate and
" diſtinct eſtates, and that therefore the property could not be carried
" by the ſpecial ſervice and infeftment that was afterwards expede in
" the perſon of Archibald the younger; in reſpect that no reſignation
" *ad remanentiam*, conſolidating the property with the ſuperiority, had
" been expede in the perſon of the ſaid William: Therefore repel the
" plea of conſolidation, and alſo of preſcription and confirmation,
" and other defences ſtated for the petitioner."

Reporter, Lord *Juſtice-Clerk.* Act. *Mat. Roſs, A. Campbell.* Alt. *Lord Advocate, Rolland, Blair, W. Craig.* Clerk, *Sinclair.*

S.

N° CCLXVII.

N° CCLXVII. *March* 10. 1786.

NEIL CAMPBELL,

AGAINST

PATRICK CAMPBELL.

WADSET.—*A reverſer may inſiſt in a declarator of redemption, notwithſtanding an order for redeeming voluntarily has been agreed on.*

THE lands of Balligown had been granted in wadſet to James Campbell and his wife; whom failing, to the heirs of James Campbell; redeemable at the firſt term of Candlemas after the deceaſe of the original wadſetters, or at the end of every nine or nineteen years thereafter.

The order of redemption preſcribed was,—by premoniſhing the wadſetter ſixty days before the term,—by an offer of the money at a particular pariſh-church,—or, in caſe of the wadſetter's not appearing to receive the wadſet-ſums, by conſignation in the hands of certain perſons.

An opportunity of recovering the lands having occurred by the death of the original wadſetters, Neil Campbell, the reverſer, executed, for this purpoſe, a ſummons againſt Patrick Campbell, who had ſucceeded to the wadſet-right. After reciting the conditions of the bargain, as before ſtated, it concluded, That the citation of the wadſetter ſhould be held equivalent to premonition; an offer of the wadſet-ſums at the bar of the Court of Seſſion, to conſignation; and that theſe things being ſo done, the lands ſhould be declared redeemed, &c.

Pleaded in defence: In the redemption of lands, the method agreed on by the parties ſhould be exactly purſued. Hence it has been underſtood by all our lawyers, that the voluntary and extrajudicial form of redeeming ought to be tried before reſorting to that which is litigious and compulſatory; the latter being only calculated to carry into effect, by authority of law, a right which has been before fully perfected; act 1592, c. 136; Craig, *lib.* 2. *dieg.* 6. p. 164.—168; Spottiſwoode, *voce* Redemption; Balfour, p. 445. 447. 453. 458; 15th June 1556, John Sempill *contra* Lady Houſton; 15th February 1562, Laird of Kinnaird; Stair, b. 2. tit. 10. § 16. 19; Bankton, lib. 2. tit. 10. § 24; Erſkine, b. 2. tit. 8. § 17.

Anſwererd for the purſuer: The forms of redemption preſcribed in contracts of wadſet were introduced in favour of the reverſer, that he might not be under a neceſſity of following out his rights in courts of law.

law. Appearing to be attended with little expence, they were generally practiſed for many years; and it was only where they had proved ineffectual for obtaining reſtitution that the reverſer thought of uſing judicial meaſures.

But it has been ſince found, on account of the many troubleſome formalities requiſite in that method of procedure, that the remedy by action of declarator is much the ſureſt, as well as the leaſt expenſive one. And ſince, by ſtipulating an opportunity of voluntary redemption, the reverſer cannot be underſtood to have renounced any right formerly competent to him, nothing ſurely hinders him from taking, in ſuch a caſe, the ſame meaſures which would have been proper if a ſpecial order of redemption had not been mentioned. 18th February 1762, Campbell and others *contra* Stewarts.

The production of a miſſive letter from the defender, whereby he agreed to renounce his ſecurity, rendered a determination of the point of law unneceſſary. The Judges, however, expreſſed their opinion, that the proceedings on the part of the purſuer were regular and competent.

"The Lords repelled the defences, and decerned in the declarator."

Lord Reporter, *Alva.* Act. *M. Roſs.* Alt. *Hume.* Clerk, *Hume.*

C.

N° CCLXVIII. *March* 10. 1786.

WILLIAM DICKSON,

AGAINST

JOHN DICKSON, WILLIAM CUNINGHAME, and others.

TAILZIE.—*The prohibitions of an entail cannot be directed againſt the maker, ſo as to hinder his debts, though contracted after its date, from being effectual againſt the lands.*

WILLIAM DICKSON, the owner of the eſtate of Kilbucho, executed an entail, by charter and infeftment, in which the prohibitions, irritancies, and reſolutive clauſes, were directed againſt himſelf, in the ſame manner as againſt the ſubſtitutes.

Having afterwards contracted conſiderable debts, he was obliged to ſell to Cuninghame a part of the lands comprehended under the entail. He then brought, againſt the ſubſtitutes, an action for trying

the validity of the ſale; while the purchaſer at the ſame time preſented a bill of ſuſpenſion, on the ground of the ſeller's want of power.

The Lords conſidered the entail to be altogether ineffectual in a queſtion with the creditors of the entailer. The ſtatute 1685, authoriſing ſettlements of that ſort, related, it was obſerved, to the caſe of *heirs* alone, whoſe intereſt might, according to the forms therein preſcribed, be limited or modified by the deed of the anceſtor, from whoſe gift they derived the eſtate. But the caſe of the proprietor himſelf was left to the regulation of the common law. The maker of the entail in queſtion might have reſtricted his right to a mere liferent, or, by executing a bond of interdiction, he might have precluded his burdening the lands, unleſs for onerous or rational cauſes. Theſe, however, were the only methods by which the order of ſucceſſion marked out by him could be ſecured againſt his future contractions; the general rule being undoubted, That no man can, by any device, withdraw his eſtate from being liable for his debts.

The Lords decerned in the action of declarator; and at the ſame time refuſed the bill of ſuſpenſion preſented by the purchaſer.

Lord Reporter, *Stoneſi* Act. *Honyman.* Alt. *Dean of Faculty.* Clerk, *Orme.*

C.

N° CCLXIX. *March* 10. 1786.

WILLIAM FRASER,

AGAINST

HIS CREDITORS.

CESSIO BONORUM.—*A perſon in trade who omits to keep account-books, not intitled to that benefit.*

FRASER, a trader, who brought an action of *Ceſſio bonorum*, acknowledged, on being required to produce his books of account, that he had not kept any ſuch; upon which it was

Obſerved on the Bench: That he had thus rendered it impoſſible to prove, in terms of law, that his bankruptcy had been occaſioned by innocent misfortunes; and therefore

The Lords found the purſuer not intitled to the benefit in queſtion.

Act. *Corbet.* Alt. *Nairne.*

S.

N° CCLXX.

N° CCLXX. *March* 11. 1786.

CHARLES MACDONALD,

AGAINST

ALEXANDER CALLENDER.

PROOF—*of payment by witneſſes, when competent.*

CALLENDER, a butcher in Falkirk, purchaſed a parcel of ſheep from Macdonald, a graſier in Stirlingſhire, as the latter was paſſing through that town on his way to the Edinburgh markets. Macdonald afterwards purſued Callender for the price; who, in defence, offered to prove by witneſſes, that though he did not pay the money inſtantly on the delivery of the ſheep, he, according to what was uſually done, paid it a few days after, when the purſuer had returned from Edinburgh. To this mode of proof the purſuer objected; and

Pleaded: It might be relevant to prove by witneſſes payments made *unico contextu* with the delivery of moveables purchaſed. But in the preſent caſe, an interval of time is ſaid to have elapſed between the one and the other; which, though ſhort, is evidently not to be diſtinguiſhed in this matter from a longer period.

Now, payment of debts, even conſtituted without writing, unleſs they are below L. 100 Scots, cannot be proved by witneſſes; Act of Sed. 8th June 1597; Erſkine, b. 4. tit. 2. § 21. The mere delivery of moveables is a fact that can hardly be miſapprehended by witneſſes when it is ſeen; but the payment of money they cannot underſtand by mere obſervation, or without a previous knowledge of the cauſe from which it ariſes.

Anſwered: The ſuppoſition, that payments beyond L. 100 Scots cannot be proved by witneſſes, appears not to reſt on any ſufficient ground. On the contrary, it ſeems more reaſonable to admit that kind of evidence in every caſe, where it is not known or preſumed that the parties had meant to diſallow it, and where the facts or things to be inquired about, are of ſuch a nature as to be ſufficiently underſtood or diſtinguiſhed by witneſſes; a doctrine which is likewiſe better ſupported by authority; Stair, b. 4. tit. 43. § 4. The payment of money ariſing from any well-known or accuſtomed tranſaction, ſuch as ſale, being of that deſcription, is proveable by witneſſes; Haddington, 19th June 1605; Durie, 16th December 1626, Finlayſon *contra* Executors of Lauder.

In

In the preſent caſe, however, the payment of the money is to be viewed rather in the light of one of the mutual preſtations of a bargain of moveables, than as made in diſcharge of a prior debt.

The Lord Ordinary allowed the proof of payment by witneſſes.

A reclaiming petition being preſented, the Court conſidered the payment as the counterpart of the bargain; and refuſed the petition without anſwers.

Lord *Juſtice-Clerk* Ordinary. Act. *Steuart.* Alt. *Dean of Faculty.* Clerk, *Menzies.*

S.

N° CCLXXI. *March* 11. 1786.

ROBERT DONALDSON, and others,

AGAINST

Sir LUDOVICK GRANT.

MEMBER OF PARLIAMENT.—*A truſt-conveyance for behoof of creditors does not take away the right of voting at the election of a member of parliament.*

AT a meeting of the freeholders of the county of Nairn, for electing a member of parliament, it was objected to one of them, that he had granted to a truſtee, for behoof of his creditors, a diſpoſition of the lands on which he ſtood inrolled, containing procuratory of reſignation, and precept of ſeiſin; in virtue of which precept the truſtee was infeft; full powers being thus conferred on the diſponee to enter into poſſeſſion, levy the rents, ſell the eſtate, and apply the proceeds towards payment of the debts. And in ſupport of the objection it was

Pleaded: Though the truſtee's infeftment was a *baſe* one, he could at any time become *publicly* infeft in virtue of the procuratory of reſignation. The right, therefore, of the truſter, is defeaſible at the will of another perſon; nor can ſuch a precarious title be underſtood as that *public infeftment and poſſeſſion* which are required by the ſtatute of 1681. Fac. Coll. 7th March 1781, Muir and Dalrymple *contra* Macadam.

Anſwered: The ſtatute of 1681 explicitly declares, "That no per-
"ſon infeft for relief or payment of ſums ſhall have vote, but the
"granters

"granters of the ſaid rights, their heirs and ſucceſſors." Now, the truſtee, as in the room of the creditors, is *a perſon ſo infeft;* and therefore that proviſion applies directly to the preſent caſe. His poſſeſſion is virtually that of the truſter. The caſe of Macadam, if not determined on a ſpecialty reſulting from the ſale of a part of his eſtate prior to the day of election, ought not to be regarded as a precedent.

The Court conſidered the poſſeſſion of the truſtee to be truly that of the truſter, and that this caſe fell directly under the above proviſion of the ſtatute; and therefore

They repelled the objection, and diſmiſſed the complaint.

For objectors, *Wight.* Alt. *Abercromby.*

S.

N°CCLXXII. *June* 16. 1786.

GAVIN KEMPT and COMPANY,

AGAINST

WILLIAM GLEN, and others.

PERICULUM. INSURANCE—*Whether an abandon may be made by the inſured, when only a part of the goods is proved to have ſuffered damage.*

CErtain goods belonging to Gavin Kempt and Company, were inſured by William Glen and others, on a voyage from the river Clyde to Antigua. The ſhip which was to carry them ſailed from Greenock on 18th November 1782.

On 7th December, the ſhip was overſet in a gale of wind; but ſoon was brought to rights, and proceeded in the voyage.

On 24th January following, the ſhip was captured by the enemy: ſhe was retaken on 26th; and on 29th arrived at the place of deſtination in Antigua.

Afterwards, in conſequence of an application in behalf of the owners, the goods were ſold by authority of the Admiral. No regular appretiation was made; and from the account of ſales, a very few articles appeared to have been damaged. But the prices fell more than 50 per cent. below the inſured values.

The owners brought their action againſt the underwriters, as if the loſs had been a *total* one; and

Pleaded: The object of insurance on any adventure, is to protect the party insured from every disadvantage to which his property would otherwise have been exposed. Whenever, therefore, the loss has been such as renders the adventure no longer worth his attention, he is permitted to abandon his property to the underwriters, and to betake himself to the indemnification provided in his favour by the policy. This, then, the pursuers were here warranted to do; their goods having been so depretiated, either by the damage occasioned by the storm, or in consequence of the capture by the enemy, as to be sold at less than a half of their orignal value.

Answered for the defenders: Such a surrender can only take place when the goods insured have never reached their destined port, or when so material a delay has intervened, as entirely disappointed the purpose of the voyage. In those cases, the adventure covered by the policy having essentially failed, the loss may be justly deemed a *total* one; and a general abandonment has been allowed, as the most expeditious, as well as the most accurate method of adjusting matters between the parties.

But where only a small part of the cargo has suffered damage, whether from a temporary capture, or from any other cause, a very different practice does and ought to prevail. The particular articles damaged alone, after being regularly valued by the judge-admiral of the place, are to be exposed to sale, and the insurers are obliged so far to make up the loss.

There cannot be the least pretence, in such a case, for abandoning those parts of the cargo which, according to the condition of the policy, have arrived in safety at their place of destination Should the prices of these fall below the values specified in the insurance, this must proceed either from an over valuation, or from a fall in the markets; the former being a fraudulent act on the part of the insured, from which he could derive no advantage, while the loss occasioned by the latter would not fall within the agreement. Fac. Coll. 1st February 1780, Edmondston *contra* Jackson.

The Court were unanimously of opinion, that matters were to be settled between the parties on the footing of a *partial* loss; the claim of the pursuers being to be restricted to the loss arising on the articles damaged, and the salvage due to the recaptors.

The Lords "found *no* sufficient ground proved for a *total* abandon-"ment; and remitted to the Lord Ordinary to proceed accordingly."

Lord Reporter, *Eskgrove.* Act. *Solicitor-General.* Alt. *Rolland.* Clerk, *Menzies.*

C.

Nº CCLXXIII.

Nº CCLXXIII. *June* 20. 1786.

JANET GIBSON, and others,

AGAINST

JOHN CLEARIHUE MACBAIN.

APPROBATE AND REPROBATE.—*A perſon having accepted of a legacy deviſed to him, cannot refuſe effect to a bequeſt contained in the ſame ſettlement, in favour of another.*

AMong the effects belonging to John Clearihue, there was an heritable bond, which devolved at his death to his ſon, who was then in India.

The ſon, however, though informed of his father's death, and though he had given authority to his agents in this country to adopt ſuch meaſures as they thought moſt for his advantage, made up no titles as heir to his father; it being doubted by thoſe who had the management of his concerns, whether he ought to betake himſelf to the heritage, or, after collating it with his father's younger children, to draw a rateable proportion of the whole effects.

In the mean time he executed a latter-will, whereby he bequeathed *his eſtate in India* to John Clearihue Macbain, one of his nephews, and *his eſtate in Scotland* to Janet Gibſon, his mother, and his other relations; expreſsly excluding thoſe who ſucceeded to him in the former from partaking in any manner of the latter.

A diſpute enſued after his death with regard to the heritable bond. As the ſums thereby ſecured were ſtill *in hæreditate jacente* of the teſtator's father, John Clearihue Macbain, who had taken poſſeſſion of his uncle's India eſtate, contended, That theſe did not fall within the words of the deviſe, which were limited to the eſtate *belonging* to the teſtator; thus endeavouring to diſtinguiſh his caſe from thoſe formerly decided, in which a legacy of a right of lands belonging to a teſtator was found effectual againſt his heir, who had taken a benefit from the teſtament in which the legacy was given. Fac. Coll. 17th January 1758, Mary Gainer *contra* Cunninghame.

The Lords found, "That John Clearihue Macbain having taken the "eſtate or effects acquired by his deceaſed uncle in India, under a ſet-"tlement executed at Calcutta, whereby he ſtood excluded from any "dividend of the effects or eſtate which was or might become the "property of his ſaid uncle in Scotland, is thereby debarred from "competing for any part of the ſums in queſtion."

Lord Ordinary, *Elliock.* Act. *Maclaurin.* Alt. *C. Hay.* Clerk, *Sinclair.*

C.

Nº CCLXXIV.

Nº CCLXXIV. *June* 21. 1786.

ROBERT HAY,

AGAINST

ROBERT FULTON.

QUALIFIED OATH.—*In what caſes payment to a third party, at the deſire of the creditor, is held to be an* intrinſic *quality.*

ROBERT FULTON was examined, on a reference to oath, with regard to a debt of L. 11 : 14 : 8 ſued for by Robert Hay.

He deponed, "That the debt was not reſting owing by him: That "the purſuer was owing to William Lymeburner the exact ſum of "L. 11 : 14 : 8; and, ſo far as he the deponent remembers, he gave "the deponent a verbal order to pay the ſaid ſum to William Lyme-"burner; and which ſum the deponent acordingly paid."

The queſtion therefore being, Whether thoſe circumſtances of payment, which were all of them poſitively denied by the purſuer, could be conſidered as *intrinſic*, the defender

Pleaded: It cannot admit of doubt, that payment, which is the natural mode of diſſolving a claim of debt, muſt be an *intrinſic* quality in an oath emitted with regard to it. Neither can it make any difference, whether ſuch payment was made to the creditor himſelf, or by his order, to another. So accordingly it has been often decided; Dictionary, *voc.* Qualified oath, 6th July 1711, Clerk *contra* Dallas; 14th January 1737, Moffat *contra* Moffat; —March 1759, Beatt *contra* Hardie.

Anſwered: The defender's argument might have been of ſome weight, if the perſon authoriſed to receive the money had been employed, as in the caſes above alluded to, for the purpoſe merely of delivering it to the creditor. But where the object of the alledged mandate was to extinguiſh a debt due by the creditor to a third party, a general oath of payment is by no means ſufficient. It is farther requiſite to prove, by the receipt or diſcharge of him who is ſaid to have received the money, that the mandate has been truly fulfilled; otherwiſe the mandant, inſtead of being releaſed from his obligation, might afterwards be obliged to pay a ſecond time. In that manner, too, though a defender is not allowed, on a reference to oath, to rear

up

up claims of compenſation in his own favour, he might do ſo in favour of another, and thereby, indirectly, deprive his creditor of what is owing to him.

The Lord Ordinary found, "That the defender has not brought "ſufficient evidence of his having paid the ſum of L. 11 : 14 : 8 to "Lymeburner, in conſequence of the purſuer's order, ſo as to ſup-"port the aſſertion of ſuch payment ſet forth in his oath."

And, after adviſing a reclaiming petition for the defender, with anſwers for the purſuer,

The Lords adhered to the judgment of the Lord Ordinary.

Lord Ordinary, *Elliock.* Act. *Cullen.* Alt. *M'Cormick.* Clerk, *Sinclair.*

C.

N° CCLXXV. *June* 21. 1786.

JOHN SPOTTISWOODE,

AGAINST

HUGO ARNOT.

PRESUMPTION.—*Mandate preſumed.*

THE practice of ſlaughtering cattle in the places within the town of Edinburgh hitherto uſed for that purpoſe, had been long complained of. Many meetings were held by the proprietors of houſes in the New Town, in order to obtain relief, at which Mr Arnot attended.

At firſt it was propoſed to obtain ſubſcriptions for carrying through an act of parliament, by which a ſufficient compenſation ſhould be provided to the butchers, to be levied by an aſſeſſment on the inhabitants; and Mr Arnot, beſides contributing a ſmall ſum, was extremely active in advancing this ſcheme.

Afterwards it was, in general, reſolved to employ Mr Spottiſwoode, a ſolicitor in London, to bring forward an act of parliament for the above mentioned purpoſe. Mr Arnot was not preſent at the meeting in which this was agreed on, nor at any after one; but no other evidence could be adduced to ſhow, that he diſſented or diſapproved of it. A law was accordingly obtained for removing the butchers, under

condition of indemnification within a limited time; which, however, were not fulfilled, the ſtatute not having authoriſed any method of raiſing the neceſſary ſums. In this manner the advantage of the whole proceedings was altogether loſt.

Mr Spottiſwoode then brought his action for the monies diſburſed by him, and for a ſuitable reward of his own ſervices, againſt the perſons, who had attended the meetings, and, among others, againſt Mr Arnot; who

Pleaded: There are only two grounds in law on which a perſon can be made liable for the expence of managing or conducting any particular piece of buſineſs. The *firſt* and more ordinary one is, his having employed the agent who managed it, in which caſe he is liable *actione mandati.* The *ſecond* is, his having derived a benefit from ſuch management, when he is liable, *actione negotiorum geſtorum.*

The preſent claim, however, cannot be though to ariſe *ex negotiis geſtis;* becauſe, from an eſſential error in the conduct of the buſineſs, its utility has been entirely fruſtrated. On the footing too, of a ſpecial mandate, it is equally deſtitute of foundation. Inſtead of authoriſing, or even approving, the abortive meaſures which were adopted, the defender was active in forwarding one of a nature totally different; and which, while it would have inſured a ſucceſsful concluſion to the undertaking, would have expoſed individuals to no other expence than they choſe to incur, or was ſuitable to their peculiar circumſtances.

Anſwered: When men unite together in order to concert an undertaking of common utility, their reſolutions muſt be held to be binding on every one who does not expreſsly declare his diſſent; Scott *contra* Dewar, 5th July 1782 *. The perſons, therefore employed in effectuating their deſigns, are underſtood to receive an authority from each of thoſe who have at any time concurred in the proceedings; nor can it be allowed to an individual, under pretence merely of his abſence at a particular period, to ſhake himſelf looſe, on an unſucceſsful termination of the enterpriſe, from his obligation. For, in thoſe caſes, *Qui tacet, conſentire videtur;* and *Qui vult quod antecedit, non debet nolle quod conſequitur;* 2d July 1725, Campbell *contra* Creditors of the Equivalent.

* The nature of this caſe, which has not been collected, was this: Mr Dewar of Vogrie had for ſome time taken an active part in procuring a law, which was then in agitation, for the emancipation of the colliers in Scotland. He had been preſes of many meetings held for this purpoſe, but had afterwards given notice to Mr Walter Scott, writer to the ſignet, who had the charge of bringing forward the act of Parliament, that he meant no longer to give it his concurrence. In an action brought by Mr Scott for the expences incurred by him, the Lords found Mr Dewar liable in that part of the ſums claimed which had been diſburſed prior to the notification.

The

The Court considered Mr Arnot's acquiescence to be equivalent to a mandate; and therefore repelled the defences.

Reporter, *Lord Swinton.* Act. *Elphinston.* Alt. *Dean of Faculty.* Clerk, *Sinclair.*

C.

N° CCLXXVI. *June* 23. 1786.

JAMES BRYCE,

AGAINST

RICHARD BRYCE.

PROVISION TO HEIRS AND CHILDREN.—*Where a certain sum has been provided to several younger children* nominatim, *one of them afterwards succeeding as heir, may nevertheless claim a part.*

ARCHIBALD BURGESS disponed his lands to his four grandsons, of whom Archibald Bryce was the eldest, successively, in the order of their seniority.

To this destination he annexed the following clause: "But with "and under the express burden of a liferent of the said lands herein "before disponed, to Margaret Burgess, my daughter, until the said "Archibald Bryce, and the other persons above named, shall attain "to the age of sixteen years complete, respectively and successively; "and *also with the burden of* 1500 *merks to the said Richard, James, and "Robert Bryce, my grandchildren,* equally amongst them; and failing "any of them by decease, the deceaser's share to accresce to the sur-"vivor or survivors," *to be paid* at their respective *majorities.*

After the disponer's death, Archibald Bryce, the eldest grandson, having reached his sixteenth year, was infeft in the lands. He died soon after; and was succeeded by his immediate younger brother, Richard, who was not, at that time, of age.

Richard was afterwards sued by James, the only other surviving grandchild, (the fourth having predeceased the testator), for the whole 1500 merks. The pursuer

Pleaded: Where a settlement has been made in favour of an eldest son, burdened with provisions to younger children, if the eldest son in life at the time of making the settlement dies, the next in seniority coming in his place is not entitled to any share of the provisions. The obvious meaning of the testator in such a case is, to make a division of his effects between him who is to be his universal representative, and those who, though equally connected with him, are not by our customs

cuſtoms entitled to ſo large a portion of his eſtate; and it cannot be imagined, that the firſt born was intended to be placed in a ſituation leſs favourable than his younger brothers, 14th December 1739, Pringle *contra* Pringles.

This general preſumption of the law is here ſtrengthened by the words of the deed; in which, not only the eldeſt, but every one of the grandſons ſucceeding to the lands, is equally burdened with the exact ſum of 1500 merks as well as with their mother's liferent. The circumſtance, of the defender's ſucceeding as heir before he attained the age at which the proviſions were exigible, ſeems likewiſe to be material, ſince no claim ever could be entered by him as a younger child; Dictionary, *voce* Implied Condition.

Anſwered: When ſums of money have been provided to younger children in general, it may be admitted, that the diſtribution ought to be made among thoſe only to whom this character is ſtrictly applicable. The deciſion, however, muſt be different where the proviſion is in favour of the particular children, *nominatim*. Here there is no room for arguments of preſumed *intention*, becauſe the *words* are clear. Each party lays claim to the ſums allotted to him, not as a younger child, but as ſpecially favoured by the deed.

But, in the circumſtances which here occurred, the defender is ſtill to be conſidered as a younger child. His claim, as ſuch, the moment his elder brother became proprietor of the lands, was completely veſted, though the term of payment was poſtponed to a period more remote, and the ſubſequent events could not create any alteration.

The Lord Ordinary had found the defender liable for the whole 1500 merks. But the caſe being brought under review, in a reclaiming petition for the defender, with anſwers for the purſuer, the Court, moved by the circumſtance of the younger children being mentioned by name, found, That the defender was only liable to the purſuer in the half of the 1500 merks, and remitted to the Lord Ordinary to proceed accordingly.

Lord Ordinary, *Elliock*. Act. *Elphinſton*. Alt. *Wight*. Clerk, *Orme*.

C.

N° CCLXXVII.

N° CCLXXVII. *June* 23. 1786.

Sir ARCHIBALD EDMONSTONE, Baronet,

AGAINST

WILLIAM LANG.

WRIT.—*Such cautionary obligations only valid in which the ſtatutory ſolemnities have been obſerved.*

WILLIAM LANG granted a miſſive letter, binding himſelf as cautioner for his ſon-in-law, who was a tenant of Sir Archibald Edmonſtone's.

The writing was not holograph, and it wanted witneſſes; but the genuineneſs of the ſubſcription could not be denied.

Being ſued by Sir Archibald Edmonſtone, William Lang

Pleaded: That his letter imported a cautionary obligation, to the conſtitution of which the ſolemnities preſcribed by the ſtatute 1681 were eſſentially requiſite; 25th November 1782, Wallace *contra* Wallace *.

The Court conſidered the point as now ſolemnly fixed by the later deciſions, that miſſive letters of the nature of the one here founded on were not obligatory or actionable. The forms made neceſſary by the ſtatute, it was obſerved, were not intended ſolely by way of *proof*, or to guard againſt forgery, of which there was no danger when the party acknowledged his ſubſcription, but were alſo required in point of *ſolemnity*, and therefore on no account to be diſpenſed with.

The judgment of the Lord Ordinary was in theſe terms:

" In reſpect the defender does not deny his ſubſcription libelled on, " nor that his ſon-in-law has entered into poſſeſſion of the ſubjects, " for the rents of which the defender, by the ſaid letter, agreed to " become cautioner, repels the defences; and decerns."

But after adviſing a reclaiming petition for the defender, with anſwers for the purſuer,

" The Lords found, That the writing in queſtion was not obliga- " tory; and therefore altered the Lord Ordinary's interlocutor."

Lord Ordinary, *Ankerville.* Act. *Craig.* Alt. *Morthland.* *Sinclair*, Clerk.

C.

* P. 109.

Nota,

Nota, The Court pronounced a deciſion on the ſame principle, 9th December 1785, Robert Walker *contra* Robert Duncan.

C.

N° CCLXXVIII. *June* 24. 1786.

WILLIAM SANDIEMAN and COMPANY,

AGAINST

The CREDITORS of GAVIN KEMPT.

FRAUD—*of one purchaſing goods, knowing himſelf to be inſolvent.*

GAVIN KEMPT for ſome time carried on a conſiderable trade in the town of Leith. In 1785 his ſituation became embarraſſed, and in the month of September of that year, his debts exceeded his funds, beyond every expectation of retrieval.

About this period he deviſed, with two other perſons, the following ſcheme of fraud. A contract of copartnery was made out, which, however, on account of the notorious inſolvency of his confederates, was induſtriouſly concealed from the public. Gavin Kempt himſelf commiſſioned from every quarter goods fit for a foreign market; and, in particular, he procured, on 25th October, from William Sandieman and Company, a quantity of linen, declaring to them an intention of paying the price on delivery.

In order to prevent an attachment of theſe goods, a mock ſale was executed, as ſoon as they arrived in Leith, in favour of one Robertſon, a clerk of Kempt's, who accepted bills of exchange for their value. After this, the goods were ſecretly conveyed to different towns on the coaſt of Fife; and a ſhip was prepared, at Alloa, to carry them abroad. Care was at the ſame time taken, that no trace of theſe proceedings ſhould appear in the books kept by Kempt. Kempt was not rendered bankrupt, in terms of the act 1696, till 15th December, forty-nine days poſterior to the delivery of the goods belonging to Sandieman and Company, which were afterwards diſcovered, and brought from the different places in which they had been concealed. A ſequeſtration of his effects was awarded; when Sandieman and Company petitioned the Court of Seſſion, that the articles they had furniſhed might be reſtored. In this they were oppoſed by the Creditors in general, who

Pleaded: It is not enough to invalidate a ſale of goods, that the purchaſer was not at the time poſſeſſed of ſufficient funds to diſcharge his prior obligations. The inveſtigation which this would occaſion into

into the gradual progreſs of inſolvency in every particular caſe, would in the end be more pernicious to ſociety than the evil it is calculated to remedy. All the length, therefore, the practice of Scotland has gone is, to annul thoſe tranſactions which have been executed within *three* days of the public bankruptcy. This was determined forty years ago, and has been recogniſed in ſeveral late inſtances. The agreement therefore in queſtion, which was completed by delivery ſeven weeks before the bankruptcy, is thus placed beyond the reach of challenge. 8th December 1736, Sir John Inglis *contra* The Royal Bank; 27th February 1765, Crawford Newal *contra* Mitchell.

Anſwered for Sandieman and Company: It is true, that the *preſumption* of fraud which ariſes from inſolvency alone, has been, by our cuſtoms, and thoſe of other nations, confined to ſuch proceedings as have taken place within three days of the *Ceſſio fori;* becauſe a perſon, though knowing himſelf to be at the time unable to pay all his debts, may yet with the faireſt intention continue his trade, in the hopes of retrieving his affairs.

But by introducing ſuch a criterion of *preſumptive* fraud, it ſurely never could be intended to preclude the interference of the Court in caſes like the preſent, where fraud is *proved* to have given riſe to a tranſaction. This muſt render all contracts invalid, agreeably to the rule, *Quod dolus dans cauſam contractui, reddit contractum ipſo jure nullum.* Nor can the ſilence of the injured party, unleſs continued during the period marked out by the long preſcription, or explained into an homologation by the circumſtances of the caſe, prevent the equity of reſtitution. Dict. *voc.* Fraud.

The Lords unanimouſly found, "That the ſale of the goods in "queſtion, by the petitioners to Gavin Kempt was brought about "by fraud on the part of Gavin Kempt; and therefore found the "ſame void and null; and that the petitioners were intitled to re-"ſtitution of their goods."

For the petitioners, *Claud Boſwell.* For the Creditors in general, *Dean of Faculty.*

C.

N° CCLXXIX.

N° CCLXXIX. *June* 24. 1786.

JOHN LOVE,

AGAINST

The CREDITORS of GAVIN KEMPT.

FRAUD.—*Dolus dans cauſam contractui.*

ON the eve of Gavin Kempt's bankruptcy, Mr Love was deſired to furniſh goods to him; which, however, he refuſed to do, unleſs Kempt's father joined in the ſecurity.

Afterwards Gavin Kempt produced, though without any authority from his father, a letter of warranty, under the ſignature of "James "Kempt and Son, military-agents, Leith;" and the goods were forwarded.

A petition having been preferred for Mr Love, of the ſame purport with that occurring in the preceding caſe, the Lords were unanimouſly of opinion, That the circumſtance of the letter of warranty alone was ſufficient to annul the bargain, which had thus been made under a condition which could not be fulfilled.

The Lords "preferred John Love to the goods in queſtion."

For the petitioner, *Ro. Cullen.* For the creditors in general, *Dean of Faculty.*

C.

N. B. Three other applications of a like nature were made at the ſame time, and attended with the ſame effect.

C.

N° CCLXXX.

N° CCLXXX. *June* 24. 1786.

DAVID WALKER, Petitioner.

SUMMARY APPLICATION,—*in what caſes competent.*

THE effects of Drummond, a dealer in grain, were ſequeſtrated in virtue of the bankrupt ſtatutes.

David Walker afterwards preferred a petition to the Court of Seſſion, ſetting forth, That he had conſigned a quantity of wheat belonging to him, in the hands of the bankrupt, who had made another conſignment of it to a third party, from whom the factor on the ſequeſtrated eſtate had demanded it, in behalf of the creditors in general.

He therefore prayed for a warrant to ſerve the petition on the factor; and that, on the particulars in it being proved, the ſecond conſignees might be ordained to deliver the wheat to the petitioner.

The Court conſidered the application as incompetent. When, as in the caſe of the creditors of Kempt, ſubjects have once been in the poſſeſſion of a factor appointed by the Court, an order for reſtitution may, on cauſe ſhown, be ſummarily granted in favour of the rightful owner. But this was here impracticable, as the wheat ſtill remained in the cuſtody of a third party, who could not be brought into Court, without the uſual forms and *inducia* of citation.

" The Lords refuſed the petition."

For the petitioner, *Dean of Faculty.*

C.

N° CCLXXXI. *June* 27. 1786.

ROBERT DUNMORE and COMPANY,

AGAINST

RICHARD ALLAN, and others.

PERICULUM. INSURANCE—*on goods, the cargo of a ſhip warranted to ſail with convoy, how vacated.*

INſurance was made at Glaſgow, in Auguſt 1782, on the cargo of the ſhip Commerce, bound from Jamaica to the river Clyde; the ſhip being warranted to ſail with convoy, with liberty to join at the place of rendezvous.

The convoy ſailed from Bluefields, which was the place of rendezvous, on 25th July. But the ſhip Commerce did not leave its port of loading till 27th; nor did it reach Bluefields till 29th. It came up with the convoy on 20th Auguſt, the maſter having then received ſailing orders from the Admiral. After this it continued with the fleet till 17th September, when, after being ſeparated in a gale of wind, it was taken by the enemy.

In an action for the inſured values, Robert Dunmore and Company, the owners,

Pleaded: If the riſk has been deſcribed by an inſurance-contract in ſpecial terms, it admits undoubtedly of the moſt limited interpretation. And hence, where it has been ſtipulated, as is uſual in the Engliſh policies, "That the ſhip ſhall *depart* with convoy from the "place of rendezvous," it would ſeem neceſſary, in order to effectuate the inſurance, that the voyage ſhould be *commenced*, as well as *performed* till the loſs happens, under that protection. This is a particular warranty, and the obligation of the inſurer is not extended to caſes which do not fall preciſely within its words.

But with regard to thoſe warranties which are framed in more general terms, the ſame conſtruction is not obſerved; Weſket, p. 102. Hog and Kinloch *verſus* Bogle and Scott; Strange's Reports, p. 1265, Gordon *verſus* Moreley, Campbell *verſus* Bordieu. Tho', therefore, ſhips inſured in Scotland are permitted, by a ſpecial clauſe, to join convoy at the place of rendezvous, this circumſtance is not, as in England, to be deemed eſſential to the bargain. It is the joining of the convoy, not the particular place at which this is effected, which is to be attended to. The moment the ſhipmaſter has, in ſuch a caſe, received ſailing orders, the veſſel comes into the ſituation deſcribed by the policy;

policy; and a delay in this reſpect, inſtead of hurting the inſurer, has a quite contrary effect; the hazard undertaken by him being thereby proportionally diminiſhed.

Anſwered for Richard Allan and the other underwriters: The condition of the policy was, that the ſhip ſhould ſail *with* convoy; and the clauſe diſpenſing with this until the ſhip's arrival at the place of rendezvous, inſtead of relaxing, added ſtrength to the uſual ſtrictneſs of the contract. It therefore neceſſarily follows, that the agreement has here become ineffectual, becauſe the ſhip did not ſail *with* the convoy, but long *after* it.

And it would be of no importance, though the failure on this point ſhould not appear to have been attended with any additional hazard. To validate an inſurance, it is not enough that the riſk run is even leſs than the riſk intended to be run. If it be not the very ſame, the contract is at an end.

Nor do the deciſions referred to ſupport a contrary doctrine. In the caſe reported by Weſket, inſurance had been made from the frith of Forth, without mentioning any certain port, to Campvere. It therefore might be juſtly held, though the ſhip had been freighted from Dundee, in the frith of Tay, that the condition of the policy had taken place; becauſe ſhe had not only fallen within the courſe generally taken by veſſels from the frith of Forth, but had even been for ſome time in that portion of ſea which is within the latter æſtuary. In thoſe cited from Sir John Strange, the ſhips, which were warranted with convoy, had been taken between the port of loading and the place of rendezvous. The loſs, therefore, was properly found to fall on the underwriters: for though the ſmalleſt deviation is fatal to a policy, it would be contrary to reaſon, to create, by implication, ſuch conditions as never can be fulfilled.

The Court did not diſtinguiſh a warranty to *ſail with convoy*, from a warranty *to depart with convoy*, where, the purſuers admitted, that, in the circumſtances which here occurred, the agreement would have been vacated. And it was obſerved, That if the condition of policies ſimilar to the preſent was not underſtood to exiſt till the receipt of ſailing orders, the inſurers claim to the premium would be entirely dependent on the maſters of ſhips, who would give effect to the inſurance, or not, as they thought it moſt for the advantage of their employers.

The Lords unanimouſly adhered to the judgement pronounced by the Lord Ordinary, who had ſuſtained the defences pleaded for the underwriters.

Lord Ordinary, *Braxfield.* Act. *Lord Advocate.* Alt. *Craig.* Clerk, *Home.*

C.

N° CCLXXXII.

N° CCLXXXII. *June* 29. 1786.

SMITH and PAYNE,

AGAINST

LAING, ARTHUR, and COMPANY.

BILL OF EXCHANGE.—Inland and Foreign.—*Proteſt after the laſt* day of grace.

A Bill drawn and accepted in London, was indorſed to Laing, Arthur, and Company, in Scotland. It was afterwards indorſed to Smith and Payne of London. The laſt of *the days of grace* happened to fall on a Sunday, and the bill was not proteſted till the day following.

Smith and Payne, the laſt indorſees, having for their recourſe uſed diligence againſt Laing and Company, prior ones, the latter brought a proceſs of ſuſpenſion, on this ground, That recourſe was barred by undue negotiation, as the proteſt ought to have been taken on the ſecond, and not delayed till after the laſt *day of grace* was expired. And in ſupport of this objection, they

Pleaded: When the third of *the days of grace* falls on a Sunday, the rule is, That the bills ſhould be proteſted on the preceding day; Kilker. *voc.* Bills of Exch. Ramſay *contra* Hogg, 6th July 1743; *ibid. et* Falconer, 29th January 1751, Cruickſhanks *contra* Mitchell. This rule is general with regard to all bills, whether *inland* or *foreign.* Dict. of Deciſ. *voc.* Bill of Exch. 9th January 1731, Mackenzie *contra* Urquhart; Bankton, vol. 1. p. 364. § 23.

If the law of England, as that of the *locus contractus*, were to govern this queſtion, the ſame rule would ſtill be admitted; this bill, in the conſtruction of that law, being, with reſpect to the preſent parties, a foreign one. For the indorſation to perſons in this country would be deemed equivalent to a new, and conſequently a foreign bill. "When a bill of Exchange (to uſe the words of the Earl of Mansfield) is indorſed by the perſon to whom it was made payable, as between the indorſer and indorſee, it is a new bill of exchange, and the indorſer ſtands in the place of the drawer." Burrow's Reports, vol. 2. p. 674.

Anſwered: Both the drawer and the drawee having been reſident in England, the bill in queſtion is *inland*, and not *foreign.* Erſkine, b. 2. tit. 3. § 25.; Blackſt. Comment. vol. 2. p. 467.

By

By the law of England, the *lex loci contractus*, the proteſting of *inland* bills at all is not neceſſary for recourſe, except as to intereſt and charges; and even then it is only required *after* the expiration of the three *days of grace*; Stat. 9th and 10th William III. cap. 17.; Bankton, vol. 1. p. 369. § 2.; Raymond Rep. p. 993. Brough *verſus* Parkins; Blackſt. vol. 2. p. 469. And a ſimilar deciſion was pronounced by this Court, with reſpect to a bill payable in London, which had not been proteſted till the fourth day after it became due. Bruce, 1ſt February 1715, Johnſton *contra* Murray.

The Lord Ordinary ſuſtained the plea of undue negotiation as a ground of ſuſpenſion; and

The Court adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Stonefield.* For Suſpenders, *Neil Ferguſſon.* Alt. *A. Campbell.*
Clerk, *Robertſon.*

S.

N° CCLXXXIII. *June* 29. 1786.

JEAN MURE,

AGAINST

ADAM MURE.

FIAR. FIDEICOMMISS. CLAUSE—*bequeathing a legacy "to a mother "and her children, begotten or to be begotten," veſts the former with the abſolute fee.*

A Teſtator bequeathed a legacy in theſe terms: "I give and be-"queath unto my niece, Marion Smart, now the wife of Robert "Mure, for the benefit of her and her children, begotten or to be be-"gotten of her body, L. 300."

Marion Smart ſurvived the teſtator, and had two children, Adam and Jean. To the former ſhe conveyed the legacy by her laſt ſettlement; upon which the latter alleging, that the fee had never been in the mother, but in herſelf and her brother, ſued him for payment of one half of the ſum.

Pleaded for the defender: As a fee cannot be *in pendente*, that of the legacy in queſtion, provided to a mother, and her children yet unborn, muſt of neceſſity have been in the mother, while the children

could only have a *ſpes ſucceſſionis*. Dict. of Deciſ. *voc.* Fiar, 7th July 1761, Douglas *contra* Ainſlie.

Anſwered: A fiduciary fee may here be ſuppoſed to have been in the mother, for behoof of her children; Dirleton, *voc.* Fee. Or rather the children, being in exiſtence before the death of the teſtator, were themſelves at that period veſted with the right. For in teſtamentary deeds, *tempus mortis inſpiciendum;* and therefore the caſe was the ſame as if they had been born prior to the date of the legacy.

Replied: Such a fiduciary fee is never to be underſtood to take place, without the cleareſt evidence. And as to the children being conſidered as *nati*, and not *naſcituri*, that is a circumſtance of no moment. Stair, 14th January 1663, Begg *contra* Nicolſon; 23d July 1675, Lamington *contra* Moor. Fac. Coll. 23d June 1779, Porterfield *contra* Graham; *ibid.* 1ſt March 1781, Cuthbertſon *contra* Thomſon.

The cauſe was reported by the Lord Ordinary; when

The Lords ſuſtained the defence.

Reporter, Lord *Gardenſton.* Act. *Rolland.* Alt. *G. Fergusſon.* Clerk, *Home.*

S.

N°CCLXXXIV. *June* 29. 1786.

ALEXANDER FERGUSSON, and others,

AGAINST

The MAGISTRATES of GLASGOW.

BURGH ROYAL. — *The powers of magiſtrates in royal burghs with regard to impoſing new duties or cuſtoms.*

THE charters from the Kings of Scotland, in favour of the magiſtrates and community of the town of Glaſgow, contain a grant "of the ſmall cuſtoms of the ports, and of the bridge, and of the "meal-market," and of various other markets there ſpecified; "together with all other duties and cuſtoms of which they *are* or formerly *were* in poſſeſſion, or which *may* happen *to be impoſed* with "conſent of the council and community of the ſaid burgh."

An impoſt or cuſtom had been immemorially levied on fiſh, oatmeal, and many ſorts of vegetables ſold within the town. But with regard

regard to the article of potatoes, though the tackſmen of the markets had frequently exacted a trifling duty from the merchants, this was only a recent practice, and never univerſally ſubmitted to.

In the year 1751, public markets had been erected by the magiſtrates. Afterwards, in 1781, they enacted, "That for all potatoes "brought into the town, and ſold either in the public markets, or in "the ſtreets, or in ſhops, a duty of 2s. on each cart-load, and pro-"portionally on ſmaller quantities, ſhould be exigible by the collec-"tors of the town's revenue."

Some of the inhabitants brought this regulation under challenge in an action of reduction; when it was

Pleaded for the magiſtrates: The adminiſtrators of royal burghs have an inherent power of levying, for the uſe of the community, certain ſmall duties or cuſtoms on goods imported or ſold within their juriſdiction. This is eſſential to the maintaining of a proper police. It has been exerciſed in every town in Scotland; and in Glaſgow it has been recogniſed by the Sovereign, to whom, by our ancient conſtitution, the prerogative of erecting corporations, with all the neceſſary and attendant rights, has been underſtood to belong. Not only the power of exacting ſuch duties as were known and eſtabliſhed, but alſo that of impoſing new and additional burdens, has been given to "the council and community of the burgh;" an expreſſion not denoting the inhabitants at large, but the magiſtrates and town-council, who, in the contemplation of law, repreſent the whole. Brady on Boroughs, p. 17. 20. 70.; Wight on Elections, p. 27.

In the exerciſe of this power, the magiſtrates have not been reſtrained either as to the *amount* of the duty, or as to the particular *object* of it. Such a reſtriction would have been highly inexpedient; becauſe the funds to be levied ought to bear proportion, in every town, and at every period, to the manners, wealth, and numbers of the inhabitants. And as to the *place* in which the duty is to be demanded, the authority of the magiſtrates is equally uncontrouled. Before the erection of proper markets, no ſpace of ground within the territory of the town could be entitled to an exemption; and after the buildings neceſſary for that purpoſe have been provided at the expence of the community, additional reaſons occur for defraying ſuch expence by a general contribution. To permit individuals to ſell goods in their ſhops, without paying the duties exigible on them in the market-place, muſt then become altogether unjuſt; while a like practice in the ſtreets is liable to the additional objection, of creating an unneceſſary embarraſſment in thoſe public paſſages of the burgh.

It is, however, a miſtake to conſider the duty in queſtion as entirely new. It is rather to be viewed as *a commutation* for thoſe formerly eſtabliſhed. Potatoes, from being an article of luxury rather than of ordinary conſumption, have now become, in a great meaſure, a ſubſtitute for oat-meal; on which, as well as on almoſt every other commodity of the ſame kind, a cuſtom or duty has been, paſt all memory, levied in this and other burghs. What greater reaſon, then, of complaint can the purſuers urge on this than on former occaſions, when

when, upon the introduction of new ſorts of vegetables, inſtead of thoſe anciently uſed, an extenſion of the old duties took place? To require the authority of Parliament on every change of this nature, for preſerving the revenues of the burgh in their former extent, would be a heavy loſs to all concerned.

Anſwered for the purſuers: The power of exacting money from individuals, either in the way of a direct tax, or of a duty on the ſale or import of commodities, is one of the moſt important that can exiſt in ſociety. To intruſt it to any one man, or to any ſet of men, without the conſent of the whole, is adverſe to the firſt principles of a free government; and in the hands of magiſtrates in royal burghs, ſelf-elected, and liable to almoſt no after accounting for their adminiſtration in office, it would be attended with the worſt conſequences.

It is true, that in thoſe unſettled times which preceded the Revolution, the rights of the ſubject were not, in this reſpect, ſo well underſtood or obſerved. As our kings could alone afford protection to merchants, they were thence induced to claim, and afterwards to communicate to others, a right of exacting taxes or cuſtoms on all goods brought within the ports of the kingdom, or ſold at the public fairs or markets. But at a very early period, the levying of *unuſual* cuſtoms was declared contrary to law; 1587, c. 54. In order to provide for any extraordinary emergence in royal burghs, a particular method of proceeding was preſcribed for impoſing a general taxation on the inhabitants in the way agreed on by themſelves, 1592, c. 153; to which laſt enactment the clauſes occurring in the charters of the town of Glaſgow evidently relate: And by the famous Bill of Rights, the power here claimed, as it never could be *conſtitutionally* exerciſed, was finally aboliſhed.

From thenceforward it has been an invariable maxim, That the King can neither by himſelf, nor by the intervention of others, impoſe a burden on any part of the community without their conſent in Parliament; and though the duties hitherto levied in royal burghs have not been taken away, they cannot, either by increaſe of the ſums formerly paid, or by an extenſion to articles formerly exempted, admit of augmentation. Accordingly it has been ſo decided as often as the queſtion occurred; and the various ſtatutes, authoriſing additional duties in theſe communities, by impoſts on ale, ſpirits, &c. have given a legal ſanction to theſe precedents; 15th November 1754, Magiſtrates of Lauder *contra* Brown; 14th June 1762, Earl of Moray *contra* Magiſtrates of Kinghorn; 1ſt March 1769, Lord Kennet *contra* Lady Frances Erſkine; 15th June 1781, Tod and others *contra* Magiſtrates of St Andrew's.

Neither can the magiſtrates of a royal burgh, by the erection of public markets, create to themſelves a power which they did not before enjoy. Where ſuch buildings have been raiſed on grounds belonging to the community, an adequate hire or recompence may, without challenge, be claimed from thoſe who carry thither their commodities for ſale; but the merchants cannot, under this pretence, be compelled to abandon their ſhops, and to ſell at the diſcretion

cretion of the magiſtrates, their goods, or any part of them, in the public markets only. To preſerve alſo the free uſe of the public ſtreets, all ſales in temporary booths, or from carts, may be prohibited; but it were ſurely moſt unreaſonable, that the magiſtrates ſhould be authoriſed to compound for this or any other nuiſance, in order to increaſe the revenues of the town.

On the part of the magiſtrates it was ſeparately contended, That they had acquired, by *poſſeſſion*, a right to exact the duty in queſtion; becauſe, notwithſtanding the introduction of potatoes was recent, the town's tackſmen had ever ſince claimed, and generally levied, a cuſtom on this article, though not preciſely on the ſame footing, nor in the ſame extent, with that now demanded. The other party alſo maintained, that the duty was at any rate exorbitant.

The firſt judgment of the Court was in theſe words: "The Lords "having adviſed memorials for the parties, teſtimonies of the wit-"neſſes adduced, and writs produced, and having heard parties "procurators thereon, *repel* the defences pleaded for the magiſtrates "of Glaſgow, *find* they have no right to impoſe or levy any impoſt, "duty, cuſtom, or tax, on potatoes brought into Glaſgow, and ſold "either on carts in the ſtreets, or by retail in houſes or ſhops."

Thereafter, however, on adviſing a reclaiming petition, with anſwers, which were followed with memorials, the Lords pronounced this judgment:

"Find, That the magiſtrates of Glaſgow have a right to eſtabliſh "proper market-places within the burgh, and to impoſe and levy "ſmall duties on potatoes, or other commodities ſold therein: Find, "That on potatoes ſold in the ſtreets, ſhops, cellars, or elſewhere "within the burgh, the magiſtrates may levy the ſame dues as when "they are ſold in the market-places; but find, That the duties lately "impoſed on potatoes are too high; and remit to the Lord Ordinary "to proceed accordingly."

Lord Ordinary, *Braxfield*. Act. *Dean of Faculty, Solicitor-General, Blair, Mortbland, J. Miller jun.* Alt. *Lord Advocate, Craig, A. Campbell.* Clerk, *Sinclair.*

C.

N° CCLXXXV. *June* 29. 1786.

PURDIE and COMPANY,

AGAINST

MAGISTRATES of MONTROSE.

PRISONER. Act of ſederunt 11th February 1671.—*Magiſtrates of a burgh found liable for the eſcape of a priſoner.*

HAY, a debtor of Purdie and Company, having been incarcerated, at their inſtance, in the priſon of Montroſe, made his eſcape from thence in the day-time, by picking the lock of the door of the apartment in which he was lodged.

The creditors brought an action againſt the magiſtrates for payment of the debt, in terms of the act of ſederunt of 11th February 1671.

The Lord Ordinary pronounced this interlocutor: "In reſpect it is "not denied, that upon Sunday, 27th June 1784, when Hay made "his eſcape, the priſon of Montroſe was kept and ſecured in the "uſual way in which it had been kept and ſecured for many years "paſt, and that the ſaid eſcape was made by picking a padlock upon "an iron lattice-door of ſaid priſon, as to which padlock, no former "apparent inſufficiency is alleged, aſſoilzies the defenders."

But the Court altered that judgment, and found the magiſtrates liable for the debt.

Lord Ordinary, *Henderland.* Act. *Baillie.* Alt. *Dean of Faculty et J. Erſkine.* Clerk, *Colquhoun.*

S.

N° CCLXXXVI.

N° CCLXXXVI. *June* 30. 1786.

JAMES SWAN,

AGAINST

JAMES SWAN.

BILL OF EXCHANGE. OATH OF PARTY,—*respecting the onerosity of a bill, required to be special.*

JAMES SWAN having made a reference to the oath of Samuel Swan, with respect to the onerosity of an indorsation of a bill, the latter deponed in general, "That he paid value for the indorsation, and was "an onerous indorsee." But being requested to mention particularly what the value was, he refused to give any more special answer.

During an action which depended on that point, between Samuel Swan and James Swan, Samuel died; and afterwards his heir, James Swan, having been made a party,

The Lord Ordinary sustained the oath as a sufficient proof of onerosity. But

The Court altered that judgment, and found, That Samuel Swan was not entitled to the privileges of an onerous indorsee.

Lord Ordinary, *Stonefield.* For the Heir of S. Swan, *Currie.* Alt. *Honyman.* Clerk, *Menzies.*

S.

N° CCLXXXVII. *July* 19. 1786.

ROBERT FRAM, and others,

AGAINST

The MAGISTRATES of DUMBARTON.

BURGH-ROYAL. — *Powers of the magistrates in the administration of the town's property.*

BY the charters from the Crown, in favour of the town of Dumbarton, a right of salmon-fishing was conferred on "the bailies, "*burgesses*, counsellors, community, and *inhabitants*."

In

In very ancient times, it appeared that the burgeſſes, in perſon, exerciſed this right, on paying a trifling yearly duty for each coble or boat to the magiſtrates.

Afterwards, for more than a century, the fiſhings were let to tackſmen, who became bound to expoſe in the market-place, at certain low rates, either the whole fiſhes caught, or a quantity thought ſufficient to anſwer the demands of the town's people.

In the year 1783, the magiſtrates having let the fiſhings without any reſtriction, Robert Fram, and other burgeſſes, inſiſted in a declaratory action, for aſcertaining their right to be provided with ſalmon in the manner formerly practiſed. They contended, that the ſalmon-fiſhing in queſtion had been conveyed to the *burgeſſes* individually; and that the low prices hitherto paid, were to be conſidered merely as a compoſition agreed on between the burgeſſes and the magiſtrates, the former being thus enabled, inſtead of fiſhing for the uſe of their families, to apply themſelves to other and more profitable purſuits.

The Court, however, were of opinion, That no right was here intended in favour of the *burgeſſes*, as diſtinguiſhed from the *community* of the burgh, repreſented by the magiſtrates; and that the magiſtrates, without any regard to former practice, were authoriſed to grant leaſes of this, in the ſame manner as of the other property of the town, whenever the general advantage of the inhabitants did not ſuggeſt a different method of adminiſtration. —— * 1776, Burgeſſes of Kilmarnock *contra* the Magiſtrates.

" The Lords aſſoilzied the defenders, and found them entitled to " expences."

Lord Reporter, *Eſkgrove.* Act. *Dean of Faculty, Maclaurin.* Alt. *Lord Advocate, Craig.* Clerk, *Colquhoun.*

C.

* This deciſion not yet collected.

N° CCLXXXVIII.

N° CCLXXXVIII. *July* 21. 1786.

ALEXANDER DUNCAN, and others,

AGAINST

The MAGISTRATES of ABERDEEN.

BURGH-ROYAL.—*Powers of the Magiſtrates in increaſing the dues paid by perſons becoming burgeſſes.*

BEtween the years 1620 and 1675, the fine or compoſition paid in the town of Aberdeen by intrant burgeſſes had been gradually increaſed by the magiſtrates from 100 to 400 merks.

In 1699, theſe dues of entry were reduced to 100 merks; and on this footing matters continued till 1779.

About this time the trade of the town had greatly increaſed. A conſiderable debt, too, had been incurred in building a commodious harbour, and in other improvements of the ſame nature; and the dues of entry were augmented to L. 25 Sterling.

Alexander Duncan, and other unfreemen, brought an action for ſetting aſide this regulation; and

Pleaded: The revenues of a royal burgh, where they ariſe from the advantages of excluſive trade, are not to be extended beyond the limits of ancient uſage and poſſeſſion. Whenever, from the expence of public works, or from any other cauſe, the income of the community has become inadequate, recourſe muſt be had, either to a general taxation of the inhabitants, as preſcribed by the ſtatute 1592, c. 153, or to the immediate authority of parliament; Stair, 11th January 1678, Town of Aberdeen. It is by theſe means alone that new burdens can at preſent be impoſed in royal burghs. In this manner only it can be ſhown that ſuch an alteration is indiſpenſably requiſite, while every danger of an improper ſelection of taxable ſubjects is precluded. The preſent regulation, by which a new obſtacle is thrown in the way of young men in their progreſs in trade, ſeems, in every point of view, moſt oppreſſive and impolitic; and the ancient practice in this burgh, as corrected and brought back at a later period to its original ſtate, does not afford any countenance to it.

Anſwered: What is here complained of as an undue extenſion of the privileges conferred on this town, is only a proper exerciſe of its eſtabliſhed rights. The benefit of excluſive trade forms an eſſen-

tial part of the conſtitution of every corporation of this ſort; nor has any limitation been impoſed as to the manner in which it is to be communicated to ſtrangers. As a due regard muſt neceſſarily be paid to the advantages ariſing from ſuch a communication, this will always vary, as trade and commerce are in a thriving, or in a declining ſtate. Thus the preſent alteration is fully juſtified by the circumſtances of the caſe; and the neceſſity of an additional revenue, on account of the expences recently incurred for the general utility, renders it altogether unavoidable.

The Court were unanimous in ſuſtaining the defences. Even the Judges who, in the queſtion from the town of Glaſgow, voted againſt the exaction of new impoſts of any ſort without parliamentary authority, expreſſed their opinion, that the price of the right of burgeſſhip might be proportioned, by the magiſtrates, to the benefits accruing from the participation of trade.

The Lords ſuſtained the defences; thus giving effect to the regulation in queſtion.

Lord Reporter, *Stoneſield.* Act. *Solicitor-General, Blair.* Alt. *Buchan-Hepburn, Hay.* Clerk, *Robertſon.*

C.

N° CCLXXXIX. *July* 26. 1786.

HENRY ERSKINE-KNIGHT,

AGAINST

GEORGE ROBINSON.

MEMBER OF PARLIAMENT.—*Evidence not laid before the Freeholders, admitted in the Court of Review.*

MRS ERSKINE, ſpouſe to Henry Erſkine-Knight, was, in virtue of marriage-articles, intitled, as heir of proviſion, to ſucceed to her father in the lands of Pittodrie, to the excluſion of a brother by a former marriage.

Her father, however, having made out a diſpoſition in her favour, ſhe did not complete her titles after his death by a ſervice, but executed the procuratory contained in the diſpoſition, and afterwards obtained a charter of reſignation from the Crown.

In virtue of theſe inveſtitures, and without founding on the marriage-

riage-contract, Mr Erſkine-Knight was inrolled, during his wife's life, as a freeholder in the county of Aberdeen.

At the meeting for electing a member of parliament, in 1786, George Robinſon, a freeholder, objected to Mr Knight's continuing on the roll. Mrs Knight was then dead; and although ſhe had left children, yet the rights formerly produced being thoſe of a ſingular ſucceſſor, her huſband, it was contended, had no right to the courteſy, nor, conſequently, to the privileges of a freeholder.

The proceedings of the freeholders, who ſuſtained the objection, having been brought under review in the Court of Seſſion, it was agreed, that Mr Knight, on exhibiting the marriage-contract before mentioned, might be re-admitted to the roll. But the queſtion was, whether a new claim was neceſſary.——For George Robinſon, the objector, it was

Pleaded: Mr Knight's qualification was twofold: *Firſt,* In right of his wife, during her life; and, *2dly,* In his own right, as tenant by the courteſy; which laſt qualification aroſe after his wife's intereſt in the eſtate had terminated, and depended on circumſtances altogether different. The claim on which he was admitted to the roll, as well as the writings then produced, was ſolely applicable to the former ſtate of his titles, while the exiſtence of his wife's brother by a former marriage gave every reaſon to ſuppoſe, that a demand on his part to be inrolled, as the huſband of an *heireſs,* would have been unwarranted and unjuſt.

The judgment of the freeholders, therefore, was perfectly unexceptionable; nor can the Court of Seſſion, on account of writings now referred to, and which were not ſo much as mentioned to the freeholders, pronounce a contrary deciſion. For though collateral or explanatory evidence may be adduced in the court of review, it never can be thought that ſuch documents as are abſolutely neceſſary for conſtituting the freehold-qualification itſelf, may be there exhibited for the firſt time; 17th July 1769, Sir John Gordon *contra* Fraſer, affirmed on appeal.

Anſwered for Mr Knight: If a huſband has been inrolled during his wife's life, in virtue of her infeftment, his right as a freeholder muſt ſubſiſt after her deceaſe, in conſequence of the courteſy, unleſs it can be ſhown, that the peculiar circumſtances of the caſe have created a diſability. There is no neceſſity for a new claim; which, however, would be required, if his right of voting were underſtood, at the two different periods, to be eſſentially different.

Hence the only proper object of diſcuſſion here is, whether the objector has produced ſufficient evidence to ſupport the proceeding of the freeholders, in ſtriking Mr Knight off the roll; and it is evident that he has not. As the method in which Mrs Knight completed her titles did not in the leaſt derogate from her character of an *heireſs*; ſo a reference to thoſe titles was far from affording ſatisfactory proof of her being a *ſingular ſucceſſor.* The ſlight preſumption, for it is no more,

more, which this circumſtance occaſioned, may, of courſe, be competently obviated, by proper evidence, in the court of review. The caſe is the ſame as if it had been aſſerted, that Mr Knight had no right to the courteſy, becauſe no children had exiſted of the marriage; an allegation which, though credited by the freeholders, Mr Knight would have been allowed to refute by a proof in the Court of Seſſion.

The Lords, by a conſiderable majority, found that a new claim was unneceſſary.

For Mr Knight, *Lord Advocate, Buchan-Hepburn, Geo. Ferguſſon.* Alt. *Dean of Faculty, Wight.*

C.

N° CCXC. *Auguſt* 2. 1786.

WILLIAM SIMPSON,

AGAINST

The CREDITORS of DUNCANSON.

MOVEABLES.—*What delivery requiſite to transfer the property.*

WILLIAM SIMPSON employed Duncanſon to build a ſhip for him.

The materials compoſing the hull were to be provided by the builder; but the employer was to furniſh the maſts and other articles neceſſary for completing the veſſel, and the price was to be paid in three different portions; one, at laying the keel; another, when the veſſel was built up and planked to the top of the gunwale; and the remaining ſums when the ſhip was launched.

After receiving payment of the firſt portion, Duncanſon, the ſhipbuilder, became inſolvent. The factor on his ſequeſtrated eſtate inſiſted, that the ſhip, in its then imperfect ſtate, was to be viewed as ſtill the property of the bankrupt, the proceeds of which were to be divided amongſt his creditors in general. Mr Simpſon, on the other hand, contended, That by the conſtruction of the veſſel in terms of the contract, it became his, *ſpecificatione;* the builder being to be conſidered merely as a mandatory, who acquired, not to himſelf, but to his conſtituent.

The determination of the caſe was thought by the Judges to depend, not ſo much on general principles of law, as on the ſpecial terms

terms of the agreement. By theſe the employer was to pay the price in different portions. Before payment, however, he had a right to ſee the work ſo far properly performed. Thus, as the builder proceeded, ſuch an appropriation took place, as prevented his creditors from attaching the ſhip without refunding the ſums advanced.

The Lords found the claim of Mr Simpſon to be preferable to that of the creditors of the bankrupt.

Lord Reporter, *Monboddo.* Act. *Mat. Roſs, Tait.* Alt. *Wight, Rolland.*

C.

N° CCXCI. *Auguſt* 2. 1786.

GREGOR GRANT,

AGAINST

WILLIAM DAVIDSON.

PACTUM ILLICITUM.—*A tranſaction between a kirk-ſeſſion and a perſon guilty of fornication, whereby the latter became bound to pay a ſum of money to the kirk-treaſurer for behoof of the poor, how far legal.*

WILLIAM DAVIDSON, having been guilty of fornication, agreed to pay to Gregor Grant, the kirk-treaſurer of the pariſh in which he reſided, a ſmall ſum for behoof of the poor; intending in this manner to quaſh any action which might have been inſtituted againſt him in the civil courts, for the penalties impoſed by 1661, c. 38. and likewiſe to prevent his being proſecuted before the tribunals of the church.

He afterwards refuſed to fulfil this agreement, on the ground of its being illegal; and

Pleaded in defence: Kirk-ſeſſions are not warranted, in a judicial capacity to impoſe pecuniary fines on perſons guilty of fornication. They are equally unauthoriſed to compound, extrajudicially, thoſe penalties which may be levied in the civil courts, in virtue of the ſtatute of 1661. Indeed this laſt muſt be quite inept and ineffectual; for as theſe fines are recoverable by a *popular* action, no private agreement with one perſon can hinder a ſubſequent proſecution at the ſuit of another. Viewed, too, as a pecuniary commutation of penance, ſuch a tranſactian as the preſent is liable to much exception. It ſeems

equally inconſiſtent with the purpoſe of diſcipline, as with the genius of our eccleſiaſtical policy. See 10th *Annæ*, c. 6.

Anſwered for the purſuer: Though kirk-ſeſſions are not authoriſed to impoſe fines for offences of this nature, they have become, as legal guardians of the poor's funds, the only proſecutors for thoſe which, by the ſtatute of 1661, may be inflicted by the juſtices of the peace, and other ordinary judges. If, then, ſuch penalties may be recovered, and are in fact excluſively ſued for by kirk-ſeſſions, no reaſon can be given, why the party liable may not agree to pay to them without a proſecution.

Neither is it of any importance in the preſent queſtion, that after an agreement of this ſort, the delinquent is generally underſtood to be diſcharged from eccleſiaſtical cenſures. Of this ſpecies of puniſhment the civil courts have no juriſdiction or cogniſance. It belongs to the ſuperior judicatories of the church alone, to put a ſtop to theſe proceedings in kirk-ſeſſions, when appearing to interfere with the ſpiritual welfare of the people.

The Lord Ordinary found, "That the debt being contracted by "way of tranſaction, to free the defender, as well from any proſecu- "tion before the juſtices of the peace, as from any eccleſiaſtical in- "quiry into his conduct, cannot be enforced by this Court; refer- "ving to the purſuer, and all others concerned, to inſiſt in a proper "action before the juſtices of the peace, or other judges compe- "tent."

A reclaiming petition having been preferred, which was followed with anſwers, it was

Obſerved on the Bench: As the practice of bargaining with kirk-ſeſſions, for irregularities of this kind, has long prevailed in Scotland, and the money thence ariſing forms a very conſiderable branch of the poor's funds: ſo there do not appear ſufficient legal grounds for preventing it in future.

The Lords altered the judgment of the Lord Ordinary, and found the defender liable.

Lord Ordinary, *Hailes*. Act. *W. Miller*. Alt. *Honyman*. Clerk, *Robertſon*.

C.

N° CCXCII.

N° CCXCII. *Aug.* 4. 1786.

CHRISTIAN SUTHERLAND,

AGAINST

JEAN SUTHERLAND.

HEIR-APPARENT. INHIBITION—*uſed againſt an intermediate apparent heir, of no effect after the ſucceſſion is taken up by a ſubſequent heir ſerving to the predeceſſor laſt infeft.*

AN apparent heir executed a deed in favour of Chriſtian Sutherland, on which ſhe uſed inhibition againſt him. He afterwards granted another obligation to Jean Sutherland.

On the death of the apparent heir, after being *three years* in poſſeſſion, the perſon ſucceeding made up titles to the remoter predeceſſor. In a competition which followed, between the inhibitor and the other grantee, the former claimed a preference in virtue of that diligence; to which, as being directed againſt an heir who died in the ſtate of apparency, the latter objected, and

Pleaded: Though an apparent heir has a title to the annual produce of the eſtate during his life; yet dying before ſervice, he cannot tranſmit any right in the eſtate itſelf, which ſtill remains *in hæreditate jacente* of the anceſtor. All diligence, therefore, intended after his death to affect ſuch eſtate, as having been his property, muſt be inept and void.

The ſtatute of 1695, it is true, has made the perſon ſerving heir to a predeceſſor laſt infeft liable for the debts and deeds of interjected apparent heirs *three years* in poſſeſſion. This, however, is no more than a perſonal obligation, through which alone, or as being thus creditors to the heir ſerved, thoſe of the intermediate apparent heirs have acceſs to attach the eſtate; ſo that in this reſpect the ſtatute has made no alteration of the common law.

Now, though inhibition may affect ſubjects to be afterwards acquired as well as thoſe antecedently belonging to the party inhibited, the diligence in queſtion muſt be unavailing, as having been uſed againſt a perſon who was at no time proprietor. No diligence can have effect in this caſe, but that which is directed againſt the heir whoſe right is completed by ſervice.

Anſwered: The object of inhibition is, to preclude debtors from diſappointing the claims of their creditors, by poſterior deeds tending to alienate or burden any real eſtate, which may fall under the right of the

the debtors. It has been admitted to be immaterial, whether ſuch eſtate had been previouſly, or not till afterwards, acquired. And it is plainly of as little importance, by what particular means it has come under the right of the debtor; whether immediately by his making up titles to it himſelf, or by the operation of law, in conſequence of titles eſtabliſhed in the perſon of a ſupervening heir. In both caſes alike, it is the right of the debtor that is ultimately exerciſed.

The inhibition in queſtion was calculated to debar all effect of the ſecond deed, in carrying off, to the prejudice of the firſt property attachable in the right of the granter; the very thing which is here attempted by the competing party. The inhibiter's claim of preference is therefore to be ſuſtained.

The Lord Ordinary found the inhibition to be ineffectual, and repelled the claim of preference made on that ground.

The Court adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Elliock.* For the Inhibiter, *Elphinſton.* Alt. *R. Craigie.* Clerk, *Home.*

S.

DECISIONS

OF THE

COURT OF SESSION.

N° CCXCIII. *November* 15. 1786.

MARSHALL, HAMILTON and COMPANY,

AGAINST

JOHN CRAWFORD and JOHN BARNS.

PERICULUM.—*Policy of insurance. A vessel being insured "to a market," is to proceed thither directly, and not to admit unnecessary delay from any other object.*

CLAUSE.—*That of "a vessel being safely moored," means according to usage of the place.*

A Vessel belonging to Marshall and Company of Greenock, was destined to sail on a voyage from that port, according to the following plan, contained in the instructions given to the shipmaster; her lading consisting chiefly of coals: "To sail first for Newfoundland, there to receive on board 300 casks of fish; and with these, the coals, and other goods, to proceed to Barbadoes, where a correspondent was to direct to the best market. The great object of the voyage being to obtain a freight homeward, if possible one to be engaged there, or at the neighbouring islands; and if this could not be done, then to proceed to Morant Bay in Jamaica, where the master was to leave the ship, and wait on other correspondents at Kingston and Manchineal, in order to secure a freight.

Having received advice of the safe arrival of the ship at Newfound-

land, Marſhall and Company opened a policy at Greenock, "on ſhip "and freight, at and from Newfoundland, until ſhe arrives at her "port or ports of diſcharge in the Weſt Indies, and is there twenty-"four hours ſafely moored; and the riſk on the freight to continue "until the cargo is there ſafely diſcharged; after the rate of one "guinea and a half per L. 100 Sterling, and one guinea per L. 100 "additional, if the ſhip ſhall proceed to Jamaica."

They likewiſe opened another policy at Glaſgow, "on the ſhip; "alſo on fiſh per ſaid ſhip, at and from Newfoundland, until the ſhip "ſhall arrive at a market in the Weſt Indies, with liberty to proceed "to Jamaica, and there be ſafely moored, and ſaid fiſh landed, at "two guineas per cent. with one per cent. additional, if the veſſel "ſhall proceed to Jamaica."

The ſhip arrived ſafe at Barbadoes, where, and at ſome neighbouring iſlands, her cargo of fiſh was diſpoſed of. But no freight offering, the maſter, according to his inſtructions, immediately purſued his voyage to Morant Bay in Jamaica, without taking time to unload and ſell the coals, which otherwiſe he could have done. Having reached Morant Bay, the veſſel was there moored with three anchors. The maſter, as directed, left her, to go to Kingſton and Manchineal for the requiſite information; and two days afterwards he returned, being deſired by the correſpondents to wait farther advice concerning the place where the freight was to be obtained. In the mean time, and after the ſhip had continued moored in the Bay for ſeven days, ſhe was wrecked in a hurricane.

The inſured brought an action for recovery of the loſs, before the admiralty-court, which was afterwards removed into the Court of Seſſion; when it was

Pleaded for the defenders: 1*ſt*, In the ſtyle of the policies, eſpecially the Glaſgow one, Jamaica is contraſted with the Weſt Indies; and thus, when the veſſel was inſured to a market in the Weſt Indies, with liberty to proceed to Jamaica, not a market in this iſland, but a port merely, was meant. Beſides,

2*dly*, A market might have been had in Morant Bay, as well as at the other iſlands, if that had been the immediate object of the voyage. It was a freight, and not a market, which was the object, and hence proceeded the delay during which the loſs happened. But it was to a market, and not till a freight could be obtained, that the ſhip was inſured; and therefore the inſurers are not anſwerable for a loſs occaſioned by the purſuit of an object with which they have no concern.

Anſwered: 1*ſt*, In the language of merchants, as well as of geographers, Jamaica, though none of the Caribbees, is an iſland in the Weſt Indies; and therefore the above criticiſm is inadmiſſible.

2*dly*, The ſhip lay at Morant Bay till a proper market, ſuitable to the intention of the voyage, could be procured; and when loſt, ſhe had not arrived at ſuch market, or at the port of diſcharge. But,

3*dly*, She was not even "ſafely moored," by which is to be underſtood moored in a harbour.

Replied:

Replied: The veſſel was moored with three anchors, in the ſame manner as other ſhips of her burden uſually are in that Bay.

The cauſe was reported by the Lord Ordinary. The Court ſeemed to be chiefly moved by the ſecond argument uſed for the underwriters; and therefore, the cauſe having been brought into Court by ſuſpenſion of the admiral's decree, which was in favour of the purſuers,

"The Lords ſuſtained the reaſons of ſuſpenſion, and ſuſpended the "letters *ſimpliciter*."

To this judgment the Court adhered, on adviſing a reclaiming petition and anſwers.

Reporter, Lord *Monboddo*. Act. *Lord Advocate, W. Craig.* Alt. *Maclaurin. Blair, J. Millar jun.* Clerk, *Home.*

S.

N° CCXCIV. *November* 15. 1786.

RICHARD THOMSON,

AGAINST

Meſſ. DOUGLAS, HERON and COMPANY.

PERSONAL AND REAL.—*A diſpoſition granted for the behoof of the diſponer, but in the terms of an abſolute conveyance, not annulled by the fraud of the diſponee.—Adjudgers take* tantum et tale.

THOMSON, in conſequence of a contract entered into between himſelf and his man of buſineſs, diſponed his lands to the latter, "heritably and irredeemably, in order that he might ſell the ſame, "and apply the proceeds for the behoof of Thomſon." The diſponee executed the procuratory of reſignation, and obtained a charter from the Crown, on which he was infeft; but as he omitted to inſert in the procuratory the above qualification of his right, it did not appear on the record. Being debtor to Douglas, Heron and Company, he conveyed thoſe lands to them, in ſecurity of his debt. Afterwards, others of his creditors adjudged the lands, but without taking infeftment.

Thomſon inſtituted an action of reduction on the head of fraud, of the right obtained by his diſponee, alleging that the latter had fraudulently failed to apply properly the value of the eſtate; in which action appearance was made for Douglas, Heron and Company, and for the adjudging creditors. The purſuer

Pleaded:

Pleaded: The right of the diſponee was in the nature of a truſt; the property of the eſtate ſtill remaining ſubſtantially in the diſponer, and the only power given to the diſponee being that of diſpoſing of it for a price, for which he was to be accountable to the diſponer. His aſſuming the character of unlimited proprietor, in order to which he omitted to ingroſs the conditions of his right in the procuratory of reſignation, was a groſs fraud, and muſt import a *labes realis* in the conveyance in queſtion; eſpecially as this was granted for a prior debt, and not for money inſtantly paid on account of ſuch ſecurity.

Anſwered: "A purchaſer or a creditor contracting upon the faith of the records, cannot be affected by any perſonal challenge upon the head of fraud, that may lie againſt the perſon with whom he contracted;" Dict. of Deciſ. vol. 2. p. 64. Nor are the adjudging creditors in a different ſituation.

Obſerved on the Bench: If a diſponee omit to ingroſs in his infeftment thoſe clauſes which were meant by the diſponer to limit or qualify his right; if, for example, a clauſe of redemption be ſo left out of the infeftment, the diſponer by this fraud can in no ſhape be hurt. The right will not be unlimited; becauſe what was truly beſtowed on the diſponee was only a limited right. But in the preſent caſe, the diſpoſition imported abſolute and unlimited property; although, as the counter part of this grant, there aroſe a perſonal obligation on the diſponee to render account. And whether this has been juſtly fulfilled, or fraudulently violated, the right of property remains equally unaffected. A *bona fide* purchaſer, therefore, might have effectually acquired ſuch property from the diſponee; and an heritable creditor by infeftment is held to be in the ſame ſituation. The adjudging creditors ſtand, however, in a different predicament; for, as it has been found by deciſions, which, for the ſtability of the law, ought not to be departed from, they muſt take the right of their debtor *tantum et tale* as it was in his perſon.

The Lords found, "That the allegation of fraud was not relevant againſt the heritable ſecurities and infeftments; but that it was relevant as to the creditors-adjudgers *."

Lord Ordinary, *Swinton.* Act. *Solicitor-General.* Alt. *Abercromby.* Clerk, *Home.*

S.

* It may be remarked, that the diſponee, who had become bankrupt, alſo appeared in the action, for the vindication of his character; and denied that he had been guilty of any impropriety. It was, however, merely a queſtion of relevancy; and the facts were regarded as hypothetical.

N° CCXCV. *November* 20. 1786.

BROWN of Johnſton-Burn.

WITNESS.—*A nephew-in-law may be examined as a witneſs.*

THE Ordinary on the oaths and witneſſes reported to the Court a queſtion as to the admiſſibility of a witneſs, who was nephew-in-law to the party in whoſe behalf he was cited.

The Lords were unanimouſly of opinion, That the witneſs ſhould be examined.

Lord Reporter, *Eſkgrove.*

C.

N° CCXCVI. *November* 29. 1786.

GAVIN HOGG,

AGAINST

JOHN FRASER.

BILL OF EXCHANGE.—*Obligation of the perſon on whom a bill is drawn.*

GAVIN HOGG, in conſequence of an order from Simon Fraſer merchant in Inverneſs, drew bills for L. 154, on Mr John Fraſer, who refuſed to accept, becauſe the ſums in his hands, belonging to Simon Fraſer, amounted only to L. 55 : 7 : 2. But he offered, for the accommodation of his correſpondent, to honour a bill of exchange for L. 100; which, however, he was not required to do.

Mr Hogg took no farther meaſures for thirteen months. By this time Simon Fraſer had become inſolvent, after Mr John Fraſer had interpoſed his credit for him to a conſiderable amount. An action

was then brought by Gavin Hogg, in which, in order to ſubject Mr Fraſer to the payment of L. 55 : 7 : 2, it was

Pleaded: The drawing of a bill of exchange, or, what is the ſame thing, the giving authority to make ſuch a draught, is equal to an irrevocable aſſignment of thoſe effects of the drawer which are at the time in the hands of the drawee. Erſkine, book 3. tit. 2. § 29.

Anſwered: If the purſuer had, within a reaſonable time, limited his demand to the ſums acknowledged to be due by the drawee, his preſent claim might have been deemed a juſt one. But it would be attended with the moſt pernicious conſequences, if by ſuch unfiniſhed tranſactions as here occurred, any reſtraint could be introduced on the freedom of commercial dealings.

" The Lords ſuſtained the defences, and found the purſuer liable " in expences."

Lord Ordinary, *Hailes.* Act. *N. Ferguſſon.* Alt. *Honyman.* Clerk, *Orme.*

C.

N° CCXCVII. *December* 15. 1786.

Mrs BARBARA LOWTHER,

AGAINST

MURDOCH M'LAINE.

ALIMENT. HUSBAND AND WIFE.—*Aliment to a wife, not entitled to legal or conventional proviſions, found due by the huſband's heir.*

MR M'LAINE of Lochbuy died within a year after his marriage to Miſs Lowther, there being no iſſue of the marriage. He had not received any portion with the lady; nor was any marriage-contract executed. Without claiming the *terce*, or the *jus relictæ*, ſhe inſtituted an action of aliment againſt the heir of her huſband, a diſtant collateral relation, to whom, by a family-ſettlement, he had deviſed his eſtate; though, being the daughter of a gentleman of ſome fortune, ſhe could not be ſaid to be in a ſtate of indigence. The purſuer

Pleaded: Claims for aliment ariſe from the ties of nature; among which, as the relation of huſband and wife is the earlieſt, ſo it is the ſtrongeſt.

ſtrongeſt. If parents, *jure naturæ*, are bound to aliment their children, the obligation on huſbands to aliment their wives is even ſuperior. Other debts, and particularly alimentary obligations, are continued againſt heirs. This, then, the moſt juſt of all, ought not to ceaſe; and no heir ſurely can be ſuppoſed more liable to the debt of an anceſtor than the defender, ſo remote a relation, to whom an opulent eſtate has devolved; 10th November 1671, Haſtie *contra* Haſtie, Kilker. *voc.* Aliment; 8th February 1739, Douglaſes *contra* Lady Douglas; 13th December 1748, Biſſet *contra* Biſſet, Select Deciſ.; 11th February 1764, Seatons *contra* Seaton, Fac. Coll. Select Deciſ.; 8th March 1759, Scott *contra* Sharp, Balfour's Practics, p. 95.; Fountainhall, 19th July 1711, Lady Kinfawns *contra* Huſband.

By the Scottiſh practice, it is true, in caſes like the preſent, no *terce* nor *jus relictæ* is due. The purſuer, who claims neither, demands only a reaſonable ſum for her ſubſiſtence out of the eſtate of her huſband, in conſideration that thoſe legal proviſions have failed. If this is to be denied to her, it muſt be becauſe the uſage now mentioned ought to be extended, by analogy, to matters of a different kind from thoſe to which it relates. But it is clear, that this conſuetudinary rule ought not to be extended: for, in the firſt place, it is irrational and unjuſt; and, ſecondly, it was improperly introduced into the Scots law, in conſequence of a miſapprehenſion of that of the Romans.

Marriage being as complete the moment it is conſtituted as at any ſubſequent period, or after the birth of children, it is plainly abſurd to conceive any reaſon for legal proviſions to exiſt afterwards which had no place before. The idea is peculiar to Scotland; and even here there is no diſtinction reſted on that foundation, except what reſpects the *terce* and *jus relictæ*. All the other legal rights belonging to a wife ariſe on the inſtant of marriage.

The error, however, was not original in the Scottiſh juriſprudence. In *Regiam Majeſtatem*, *lib.* 2. *cap.* 16. 17. where the doctrine of Terce is fully treated, there is not the leaſt intimation of ſuch a rule. Nor are any traces of it to be diſcovered in the ſtatutes of Alexander II. or of Robert III. reſpecting the ſame ſubject. The earlieſt appearance of the rule is towards the beginning of the ſixteenth century, in the caſes of Windezettis *contra* Logan, and Gyle *contra* Cant; the firſt relating to the return of the tocher, and the ſecond to the wife's right in the moveables; Balfour's Practics, p. 95. As to the terce, the queſtion was not determined till *ann.* 1600, in the caſe of Lord Gairlies *contra* Lady Maxwell, Haddington. Craig, lib. 2. dieg. 22. § 23. But as on the diſſolution of marriage the *dos* and *donationes propter nuptias* were by the Roman law mutually reſtored, the ſame rule has been admitted into the Scottiſh cuſtoms in regard to ſuch marriages as diſſolve within the firſt year, and without any child; Craig, lib. 2. dieg. 22. § 23. Among the Romans, however, there was no right of primogeniture, nor preference of males in ſucceſſion; in conſequence of which circumſtances, the *dos* formed a juſt proportion of inheritance, and equal to that of any male. When reſtored, it was a fund for ſubſiſtence, and no aliment was wanting. The reverſe is the ſituation

of

of daughters under the Feudal inſtitutions; their dowry is a trifle, inſufficient for their ſupport. Beſides, the *dos*, or *donationes propter nuptias*, were to be reſtored equally after any period; and it is obvious, that the Scottiſh diſtinction is inconſiſtent with the end or nature of the Roman reſtitution.

As a rule originating in injuſtice and error ought not to be extended to new caſes, ſo this proper limitation has been conſtant in the practice of the Court. Thus the rule was not applied to the caſe of a marriage diſſolving within the year, a child having been born, though it likewiſe died during the ſame period; 20th July 1632, Irvine *contra* Robertſon, Dict. of Deciſ. vol. 1. p. 415.: Nor to that of a father ſettling on his ſon, in contemplation of marriage, a ſum which by the ſon was aſſigned to his wife, ſeeing the marriage did not ſubſiſt a year; Kilkerran, 7th November 1740, Hood *contra* Jack: Nor to the interim aliment claimed by a widow for herſelf and her family, between the huſband's death and the payment of her proviſion, the marriage having diſſolved within the year, and the proviſion being ſecured by a ſpecial paction, which did not include any interim aliment; Clerk Home, 19th February 1743, Stewart *contra* Garden.

Nay, the rule has been found not to extend to the ſpecial caſe in queſtion. Thus, at a period when the law gave that liberty, a father having put his ſon in the fee of his eſtate, without reſerving his wife's terce, and by the death of both father and ſon, the lands having fallen to the ſuperior by ward and non entry, firſt the ſuperior, and afterwards the heir ſucceeding, became bound to allow the widow a reaſonable aliment; Balfour, 21ſt July 1534, Logan *contra* Campbell and Wallace. Again, in the caſe of Thomſon *contra* Macculloch, Fac. Coll. 6th March 1778, the legal proviſions of terce and *jus relictæ* not being adequate, the Court found an additional aliment due to a widow; and it would be abſurd to ſuppoſe, that if thoſe proviſions had been more inadequate, or had not exiſted at all, the claim of aliment could have been juſtly denied.

Neither is it incongruous, when circumſtances do not admit ſpecific legal proviſions, that the law ſhould afford, in another ſhape, that aliment for which they were calculated. The legitim of children is a ſpecific legal proviſion for their aliment; but if it is precluded by the father's effects being converted into heritage, the heir is bound to furniſh a competent maintenance to them.

Anſwered: Apart from the proviſions contingent on the ſubſiſtence of marriage for year and day, or until the birth of a child, the law of Scotland recogniſes no claim for aliment at the ſuit of a wife, againſt the heirs, as ſuch, of her huſband. Nor is this inconſiſtent with the analogy of our law. However ſtrongly founded the obligation is on parents to aliment their own children, an heir-male ſucceeding, in prejudice of the daughters of the anceſtor, will not be liable to the claim for aliment which lay againſt their father. A brother ſucceeding indeed might; but the diſtinction evidently ariſes from his fraternal relation. Were not ſuch limitation admitted, inextricable confuſion and embarraſſment would naturally attend every

quick

quick ſucceſſion of heirs; the obligations to aliment incumbent on one deſcending to another, and accumulated with his devolving on the next, without any ſtandard for ſettling the proportion of theſe multifarious claims. Beſides, there is this peculiar to the relation of marriage, that the marriage being diſſolved, the law deems the connection thence proceeding to be at an end. Thus, though a father was held to be liable for the aliment of his ſon's wife during the lifetime of the ſon; yet after his death the claim was found not to lie; Dict. of Deciſ. vol. 3. *voc.* Aliment, 14th June 1765, Lawder *contra* Sir Andrew Lawder.

To the argument founded on the caſe of Stewart *contra* Garden, the anſwer is, That the interim aliment was granted, not to the wife, but to the huſband's family. As to that of Logan *contra* Campbell, the marriage had ſubſiſted for the requiſite time, and the legal proviſions thence ariſing had been diſappointed by fraud. At preſent they would be wholly reſtored; at that early period they were reſtored to a certain extent. The caſe of Thomſon *contra* Macculloch was an amicable ſuit; and moreover the aliment was claimed by a mother from her own ſon.

That, beſides the above mentioned ſpecific proviſions, the law admits no claim for aliment at the inſtance of wives againſt their huſbands heirs, is evident from the explicit opinion of all the writers on our law. Thus Lord Stair, b. 1. tit. 4. § 19. Bankton, b. 1. tit. 5. § 117. and Erſkine, b. 1. tit. 6. § 38. concur in declaring, that a marriage diſſolving within the year, and without a living child, "all "things return to the condition in which they were before;" by "all "things" being evidently meant, all claim or intereſt in the reſpective eſtates of the married pair; as to the *dos* on the one hand, and on the other, the *donationes propter nuptias*, the legal or conventional proviſions by the huſband to the wife. To ſuppoſe that a claim for aliment ſhould ſtill continue, is to figure a contradiction in the law; in rejecting, and at the ſame time allowing, a demand, the ſame in effect, and only differing in the ſhape in which it is preferred. Had ſuch a right remained, it could not have failed to be recogniſed by the authors quoted above; nor to appear in thoſe deciſions which have proceeded on the principle upon which the legal proviſions are withheld. In the above caſe of Stewart *contra* Gordon, for example, why was not a permanent right of aliment inſiſted on by the widow? In that of Somerville *contra* Bell, Kames, 22d February 1751, where a ſettlement on a wife was annulled on the ſame ground, would not a claim for a competent aliment have been made, and reſerved by the Court, if ſuch an one had been known in law? Or in the ſimilar caſe of Cuming *contra* Garden, Fac. Coll. 7th February 1781?

It has been ſaid, That the rule in queſtion is in itſelf unjuſt, and that it was by miſtake introduced into our law at a late period. But Craig aſſures us, that the return of the tocher "*omnium ſeculorum uſu* "*comprobatum*," lib. 2. dieg. 22. § 23. There ſeems nothing irrational in having admitted this return from the Roman law, under

our limitation; and being once admitted, that right which was the counter part to the tocher, the *quid pro quo*, came to be withheld of courſe. The caſe of Gairlies, it is to be remarked, related to a conventional proviſion, ſo is not to be regarded as the earlieſt reſpecting the legal terce. Nor is the diſtinction of *year and day* ſo ſingular as has been ſuppoſed. It is exemplified in the uſages of ſeveral provinces, counties, or bailiages of France, as Anjou, Brittany, Maine, Touraine; Nouveau Coutumier General, p. 584. And were its foundation in juſtice ever ſo queſtionable, the province of a judge is to determine according to its foundation in law, and *ita lex ſcripta*.

The cauſe was heard in preſence, and afterwards memorials were appointed.

A majority of the Court conſidered the claim of an indigent widow for aliment from the heir of her opulent huſband as deeply founded in nature; and that the withholding of the legal proviſions, by the operation of the rule of year and day, made the exerciſe of that natural right neceſſary; while others of the judges argued, That this was granting in effect the very thing which the law had denied.

"The Lords repelled the defences, and found the purſuer intitled "to a claim for aliment out of the eſtate of her deceaſed huſband; "and remitted to the Lord Ordinary on the bills, to hear parties "procurators upon the quantum of the ſaid aliment."

To this judgment, on adviſing a reclaiming petition, with anſwers, the Court adhered.

Act. *Dean of Faculty et Cullen.* Clerk, *Colquhoun.*

Alt. *Lord Advocate, M'Leod Bannatyne, et W. Campbell.*

S.

N° CCXCVIII.

N° CCXCVIII. *December* 19. 1786.

HELEN SCOTT,

AGAINST

JERDON CAVERHILL.

WITNESS.—*A witneſs, otherwiſe inadmiſſible, examined concerning a tranſaction, the circumſtances of which he had peculiar opportunities of knowing.*

THE deceaſed Archibald Jerdon executed a general ſettlement of his effects, in favour of Jerdon Caverhill, to the excluſion of Mrs Helen Scott, his legal heir. The deed was framed by Mr Cornelius Elliot writer to the ſignet, who alſo witneſſed the execution of it. He was likewiſe named one of the truſtees for carrying the ſettlement into effect. And when Mrs Scott commenced an action for ſetting it aſide, as having been obtained from Mr Jerdon while in a ſtate of dotage and mental incapacity, he was employed as agent for the defender.

The defender having propoſed to examine Mr Elliot with regard to the execution of the deed, the purſuer objected; and

Pleaded: No perſon ought to be examined as a witneſs who may juſtly be ſuſpected of having conceived a partiality for one of the parties, or who may gain or loſe by the iſſue of the diſpute. Hence, not only tutors and curators, in the cauſes of their wards, but alſo advocates and agents, have been excluded from giving evidence in thoſe queſtions in which they are profeſſionally employed. Stair, book 4. tit. 44. § 9.; Erſk. book 4. tit. 2. § 25.; Dict. *voc.* Witneſs.

Anſwered: A diſtinction is to be made between thoſe occurrences which fall under the obſervation of many perſons, and circumſtances which from their nature can be known only to a few. As to the former, every reaſonable cauſe of diſtruſt may be allowed to have its full influence; but with reſpect to the latter, of which the preſent caſe affords an example, it would be highly unjuſt, if a ſlight ſuſpicion were altogether to diſqualify a witneſs, whoſe integrity is unqueſtionable, and whoſe grounds of information, with regard to events of the utmoſt importance, muſt be ſo peculiarly good. Stair, book 4. tit 44. § 10.; Kilkerran, 21ſt November 1749, Earl of March *contra* Sawyer; November 28. 1771, Maclatchie *contra* Brand, ~~Affirmed~~ reversed in the Houſe of Lords, March 22. 1773.

The

The Lords were at firſt inclined to ſuſtain the objection; but after a conſideration of the later deciſions, they unanimouſly admitted the teſtimony of Mr Elliot.

Lord Ordinary, *Dunſinnan.* Act. *Solicitor-General, Honyman.* Alt. *Wight, E. Armſtrong.* Clerk, *Robertſon.*

C.

N° CCXCIX. *December* 23. 1786.

[TEIND-COURT.]

Mr WILLIAM MITCHELL, Miniſter of Tingwall, in Zetland,

AGAINST

The HERITORS of that Pariſh.

STIPEND. JURISDICTION.—*A miniſter's ſtipend augmented poſterior to the Union, not to receive an after augmentation.*

THE ſtipend of the pariſh of Tingwall received an augmentation in 1722. In 1786, however, Mr Mitchell, the miniſter, having brought againſt the heritors a new proceſs of augmentation, the defenders

Pleaded: The Court have no power to grant a new augmentation of any ſtipend which has already been augmented ſince the paſſing of the act of parliament of 1707, cap. 9. from which they derive their authority.

By that ſtatute a commiſſion was conferred on the Lords of Seſſion, inveſting them with the ſame powers that by the ſtatutes of 1633, c. 19. 1690, c. 23. 30. and 1693, c. 24. had been intruſted to former Commiſſioners of teinds. With reſpect to the ſtipends of miniſters, the power committed was, "to appoint conſtant and local ſtipends;" which plainly implies, that the appointment was ſingle, and not to be repeated. For this being once made, and the object of the commiſſion ſo far accompliſhed, its powers muſt ceaſe of courſe; and nothing but a renewal of it can authoriſe a ſecond appointment, or a new augmentation of ſtipend. If, in the progreſs of time, either the lowering of the value of money, or any other circumſtances, give occaſion for an addition to the livings of the clergy, it will belong to the Legiſlature to grant a new commiſſion, with correſpondent authority. The preſent demand from the Court is unprecedented,

as

as well as illegal. For in a few inſtances, in which there is the appearance of a ſecond augmentation having been granted, it will be found, that the firſt had been brought about by colluſion, and as ſuch was entitled to no regard.

Anſwered: Prior to 1633, they were mere temporary expedients that were adopted for the proviſion of the Reformed Clergy. Afterwards the change introduced into the ſtate of teinds by the decreets-arbitral of King Charles I. rendered it neceſſary to inveſt the Commiſſioners with enlarged powers. Teinds were declared to be ſubject to the perpetual burden of the "miniſters ſtipends already granted, and of ſuch "augmentation of ſtipend as ſhould be found juſt and expedient;" Act 1690, c. 23. In conformity to this rule, the juriſdiction of the Court muſt now ſtand under the authority of the ſtatute of 1707, as comprehending, *inter alia*, the enactment laſt quoted. It is a Court of permanent inſtitution; and it would be abſurd to ſuppoſe, that its power to allot "ſuch a ſtipend as ſhould be found juſt," upon a due conſideration of circumſtances at the time, ought to be precluded on account of an allotment made, however juſtly, at a former period, and in circumſtances widely different. In fact, the Court has frequently exerciſed ſuch a power, as, for example, in the caſes of Kinnettles in 1767, of Lochbroom in 1769, Pennycuick in 1774, Kettle in 1774, and St Andrew's and Deerneſs in 1776. Nor is it a ſufficient objection, that the preceding augmentations may have been ſettled through colluſion; for that circumſtance does not ſeem to affect the juriſdiction of the Court. And in the caſe of Kirkden, the Houſe of Lords, in 1783, appeared to give their ſanction to the ſame interpretation of the powers of the Court.

The Court appointed a hearing in preſence; after which memorials were ordered. On adviſing theſe,

"The Lords diſmiſſed the proceſs, and aſſoilzied the defenders."

To this judgment the Court adhered, after adviſing a reclaiming petition and anſwers.

Act. *Dean of Faculty, et Procurator for the Church.* Alt. *G. Ferguſſon, et C. Hay.*

S.

N° CCC. *January* 19. 1787.

JOHN ADAIR,

AGAINST

ROBINA and JEAN ADAIRS.

EXHIBITION—*ad deliberandum, competent on the title of* Apparency *in an heir-male.*

JOHN ADAIR, as heir-male to his brother, inſiſted in an action of exhibition *ad deliberandum*, againſt Robina and Jean Adairs, his nieces, who had been ſerved heirs of line to their father; alleging, in general, that the lands which belonged to the deceaſed had been deviſed to heirs-male.

Pleaded for the defenders: In order to warrant ſuch an action as the preſent, ſome writing or deed muſt be produced, or particularly condeſcended on, whereby the heirs-general have been excluded, and thoſe of a different deſcription brought into their place. Unleſs there is probable ground for ſuppoſing that a deviation from the ordinary rules of inheritance has occurred, it is only competent to the heirs of line. Erſkine, book 3. tit. 8. § 51.

Anſwered: The *jus ſanguinis*, or the relation to the anceſtor, in any of the characters recogniſed by law, whether as heir of line, of conqueſt, or heir-male, is alone a ſufficient title for carrying on an action of exhibition *ad deliberandum*. If it were farther neceſſary, to produce ſome writing, deviſing the eſtate to the particular order of heirs, or even to deſcribe it in a ſpecial manner, this form of law, introduced in favour of apparent heirs of every denomination, might be altogether fruſtrated; becauſe the perſons againſt whom the action is brought may be poſſeſſed of all thoſe documents which regulate the ſucceſſion. Stair, p. 433.; Bankton, vol. 2. p. 324.; Erſkine, book 3. tit 8. § 56.

The Lord Ordinary found, "That the purſuer had no title to inſiſt "in the action, in reſpect he had neither produced nor condeſcended "on any writing or deed deviſing the eſtate to heirs-male."

After adviſing a reclaiming petition, with anſwers, "the Lords al- "tered the interlocutor of the Lord Ordinary, and remitted the cauſe "to his Lordſhip to proceed accordingly."

Lord Ordinary, *Swinton.* Act. *Geo. Wallace.* Alt. *Geo. Fergusſon.*
Clerk, *Home.*

C.

N° CCCI.

N° CCCI. *January* 26. 1787.

EDWARD BRUCE, Writer to the Signet,

AGAINST

WALTER ROSS, Writer to the Signet.

PACTUM ILLICITUM.—*A wager reſpecting the election of a member of parliament, not actionable.*

MR BRUCE and Mr Ross laid a bet of L. 50 reſpecting the election of a member of parliament for the eaſtern diſtrict of Fife boroughs, the latter being the agent of one of the candidates. The former thinking he had gained the wager, demanded the money; and upon the latter refuſing payment, brought an action againſt him.

The purſuer *pleaded:* A wager is a bargain neither immoral in itſelf, nor reprobated by any ſtatute. Gaming with cards or dice for money is at leaſt of as hurtful conſequence as wagering; but that it is not contrary to law, is evident from the act 1621, cap. 14. which, without prohibiting, impoſes only certain reſtraints on that mode of gaming. Thoſe reſtraints, however, do not affect wagers, the lawfulneſs of which is evinced by Sir George Mackenzie's obſervations on the ſame ſtatute. This contract, therefore, is a legal ground of action; and ſo, in a caſe 9th February 1696, reported by Dirleton, the Court found.

The defender ſtated nothing with reſpect to the competency of the action; his argument being confined to the queſtion of fact, Whether the wager was loſt or won by him. But

The cauſe being reported by the Lord Ordinary, the Court ſeemed to be unanimous in the opinion, that action ought not to be ſuſtained. The Judges, in general, regarded a wager as in no caſe a legal ground of action; while ſome, who thought differently, were, nevertheleſs, diſpoſed to deny action in this particular caſe, from the idea, that political operations were a peculiarly improper ſubject of wagering.

On this ground, therefore, for on the matter of fact the opinion of the Court appeared to be in favour of the purſuer,

"The Lords diſmiſſed the action, and aſſoilzied the defender."

A reclaiming petition againſt this judgment was refuſed without anſwers.

Reporter, *Lord Ankerville.* Act. *Wight.* Alt. *Ipſe.* Clerk, *Orme.*

S.

N° CCCII. *January* 31. 1787.

WILLIAM DREW and PATRICK M'MILLAN,

AGAINST

DAVID MANSON.

ARBITRATION. WRIT.—*Both ſubmiſſion and decreet-arbitral may be lawfully written on the ſame ſheet of ſtamped paper.*

DREW and M'MILLAN inſtituted againſt Manſon a reduction of a decreet-arbitral, on this ground, That it was written on the ſame ſheet of paper with the ſubmiſſion, and not on a ſeparate ſheet of ſtamped paper, in terms of the ſtatute 23d Geo. III. cap. 58. which enacts, "That for every piece of vellum or parchment, or ſheet or "piece of paper, upon which ſhall be ingroſſed, written or printed, "any *award*, there ſhall be charged a ſtamp-duty of five ſhil-"lings."

Pleaded for the defender: 1*ſt*, A decreet-arbitral in the Scotch form is not comprehended under the word "Award," which is an expreſſion peculiar to the law of England; and therefore, though the thing ſignified were the ſame in both countries, ſtill the ſtatute would not reach beyond the proper acceptation of the term. This ſtrict limitation has accordingly obtained in practice with reſpect to the other ſtamp-acts. But, 2*dly*, As the ſubmiſſion is written on paper paying the requiſite duty; and as both ſubmiſſion and decreet-arbitral conſtitute one individual contract, the latter has been properly ingroſſed on the ſame paper with the former; and there is no ground for the objection as to the ſtamp-duty.

Anſwered: 1*ſt*, The word "Award" is an expreſſion uſed by the writers on the law of Scotland as ſynonymous with that of decreet-arbitral. 2*dly*, The contract by which parties ſubmit to the deciſion of an arbiter, and the decree pronounced by the arbiter, are things evidently diſtinct and ſeparate from each other; and the writing of two

two different deeds on the ſame ſheet of ſtamped paper is a direct tranſgreſſion of the law.

The Lord Ordinary found, " That the deed in queſtion is not duly " ſtamped; and therefore reduced in terms of the libel."

A reclaiming petition againſt this judgment having, with the anſwers, been adviſed by the Court, it was

Obſerved on the Bench: Submiſſions and decreets-arbitral forming together the eſſential contract of the parties, have been uſually written on the ſame ſheet of paper. Nor do the late ſtatutes appear to introduce any change in this matter.

The Lords therefore altered the Lord Ordinary's interlocutor, and repelled the above mentioned reaſon of reduction.

Lord Ordinary, *Hailes.* Act. *M'Cormick.* Alt. *Dean of Faculty.* Clerk, *Sinclair.*

S.

N°CCCIII. *January* 31. 1787.

JAMES BUCHAN,

AGAINST

JAMES ROBERTSON-BARCLAY, and others.

PRESCRIPTION. BILLS OF EXCHANGE.—*The ſexennial preſcription of bills of exchange, not obviated by a relative writing of equal date with the bill itſelf.*

PROOF.—*Oath of the debtor, after his bankruptcy, if good againſt his creditors.*

A Debtor of James Buchan tranſmitted to him, in a miſſive letter, a bill of exchange for the ſums which were due. The letter itſelf imported an acknowledgement of the debt, and particulariſed the circumſtances attending it.

The debtor ſome time after became publicly bankrupt, and obtained a *ceſſio bonorum;* and Mr Buchan, more than *ſix* years poſterior to the term of payment ſpecified in the bill of exchange, took out a decreet in abſence, and thereupon proceeded to adjudge the debtor's lands.

In the ranking which followed, an objection was made by James Robertſon-Barclay, and the other creditors, to the claim of James Buchan, as having fallen under the ſexennial limitation of bills of exchange introduced by act 1772, c. 71.——James Buchan

Pleaded: The miſſive letter which accompanied the bill, as it would be ſufficient, independently of any other document, to conſtitute a debt, muſt ſurely be thought to bring the preſent caſe within the exception of the ſtatute of 1772, whereby the ſums ſtipulated in a bill of exchange, or promiſſory note, may, even after the expiration of the ſix years, be proved to be *reſting owing* by the *writing* of the debtor.

2dly, The preſent claim might, if neceſſary, be confirmed by the *oath* of the party. This mode of proof, having been recogniſed by the Legiſlature itſelf, cannot be taken away by any change in the ſituation of the debtor; although it may on that account be liable to ſuſpicions, to which the Court will pay more or leſs regard, according to the circumſtances of the caſe.

Anſwered: The ſtatute of 1772 being grounded on a preſumption, that the debt vouched by a bill of exchange which has lain over for ſix years, though once due, has been already paid, its effect cannot be precluded by a writing of the ſame date with the bill itſelf.

2dly, The propoſed reference to oath muſt likewiſe be inadmiſſible. Where a debtor has become inſolvent, and more eſpecially where, in conſequence of his obtaining a *ceſſio bonorum*, he can ſcarcely be conſidered as *perſonally* liable for the debts contracted by him, no acknowledgement of his ought to be of ſufficient authority to prejudge his creditors at large. Erſkine, book 4. tit. 2. § 10.

The Lord Ordinary ſuſtained the objection. But after adviſing a reclaiming petition for James Buchan, with anſwers for James Robertſon-Barclay and others,

" The Lords found, That the miſſive letter produced does not in-
" terupt the ſexennial preſcription; but that it is ſtill competent to
" refer the fact of *reſting owing* to the oath of the debtor."

Lord Ordinary, *Ankerville.* Act. *Maconochie.* Alt. *C. Hay.* Clerk, *Home.*

C.

N° CCCIV.

N° CCCIV. *January* 31. 1787.

JOHN BEADIE,

AGAINST

The other CREDITORS of THOMAS HEGGIE.

BANKRUPT-ACT, 23d Geo. III. c. 18.—*A ſequeſtration is not ineffectual, although the parties who applied for it are not creditors to the legal amount.*

AFter the effects of Thomas Heggie had been ſequeſtrated in virtue of the ſtatute 23d Geo. III. and a factor appointed, it was diſcovered by John Beadie, an arreſting creditor, that the debts due to the perſons at whoſe inſtance theſe proceedings had been held were not of the extent required by the ſtatute.

He therefore preferred a petition to the Court of Seſſion for recalling the ſequeſtration; and

Pleaded: The chief defect of the ſtatute of 1772, authoriſing the Court of Seſſion to award ſequeſtrations, aroſe from its not being confined to thoſe perſons who, from the nature of their buſineſs, as well as the extent of their commercial tranſactions, were the proper objects of ſuch a regulation. The after law, therefore, paſſed in the 23d of his preſent Majeſty, while it limited ſequeſtrations to the caſe of merchants and traders, was particularly careful to remedy this defect, by enacting, that no ſequeſtration ſhould be awarded, unleſs on the application of *one* creditor for L. 100, of *two* for L. 150, or of *three* for L. 200. It is indeed true, that where a ſequeſtration has been obtained of the effects of one who afterwards appeared not to be of that condition in life which comes under the ſtatutory deſcription, the right of applying for redreſs has been ſpecially limited to thirty days. But as no ſimilar proviſion occurs with regard to the extent of the debts, this circumſtance ſeems rather to confirm than to weaken the preſent argument.

Anſwered for the other creditors: To prevent ſequeſtrations where the amount of the debts owing by the bankrupt is very inconſiderable, it has been provided, that the creditor or creditors applying ſhall make oath, that their claims are of a certain extent. But from this it is not to be imagined, that where the debts due to thoſe creditors have, either by miſtake, or even from a more unjuſtifiable cauſe, been exaggerated, the whole proceedings are on that account to become ineffectual and void. This might be reaſonable enough with regard

regard to the parties in whoſe name the application was made; but with reſpect to the creditors in general, who are naturally led to conſider a ſequeſtration as a ſuſpenſion of every other mode of diligence, it would be highly unjuſt. Nor, in fact, does this ſtatute labour under ſo great an imperfection. Though any individual injured by an improper application, may doubtleſs obtain redreſs from the perſons who have occaſioned his loſs, ſtill the ſequeſtration itſelf ſubſiſts in its fulleſt extent. The limited proviſion which has been made for recalling a ſequeſtration, where the employment of the bankrupt has been erroneouſly deſcribed, would be alone ſufficient to ſhow this to have been the intention of the Legiſlature.

The petition was remitted to an Ordinary; who, after a proper inquiry into the facts, reported the cauſe to the Court.

"The Lords refuſed the petition."

Lord Reporter, *Henderland.* Act. *Buchan-Hepburn.* Alt. *Maconochie.* Clerk, *Home.*

C.

N° CCCV. *February* 2. 1787.

ROBERT BOGLE,

AGAINST

DUNMORE and COMPANY.

MOVEABLES. DELIVERY brevis manus.—*Property of goods on ſhip-board transferred on ſale by indorſations of the bills of lading.*

WALTER MONTEATH ſold to Robert Bogle a parcel of ſugars, then on board of a ſhip juſt arrived in the harbour of Greenock, and belonging to Dunmore and Company. At the ſame time the bill of lading, blank indorſed, was given up to the purchaſer; who thereupon granted to Dunmore and Company an obligation for the payment of the freight.

Dunmore and Company being creditors of Monteath, who in the mean time had become bankrupt, now refuſed to deliver up the ſugars to Bogle, of which they claimed a right of retention, as being the property of their debtor, having cauſed the goods to be carried from ſhip-board into a private repoſitory of their own.

In

In an action at the inſtance of Bogle againſt Dunmore and Company, for delivery of the goods *, it was

Pleaded for the defenders: If the goods of a debtor are in the lawful cuſtody of his creditor, he may retain them for his payment. Even though they have come into the poſſeſſion of the creditor under the condition of his reſtoring them to the debtor, ſtill the right of retention will be competent, if the debtor be bankrupt, or *vergens ad inopiam*. An obligation, indeed, to reſtore was laid on the creditor; but of that the debtor cannot require fulfilment, while he is unable to perform an equal obligation incumbent on himſelf. This principle was ſtrongly recogniſed by the judgment of the Houſe of Peers, in the caſe of the Truſtees of Stevenſon *contra* Hewit and Brokeherſt, determined by the Court on 17th February 1775; as it had formerly been by their judgments in the caſes of Lees *contra* Dinwoodie, 10th December 1707, Fountainhall; and of Creditors of Glendinning *contra* Montgomery, 8th June 1745, Kames. It is evident, that there is nothing in the nature of the contract between the owner of a ſhip and the perſon to whom it is freighted, which can create an exception from this equitable rule; and therefore the defender was at liberty to aſſume his right of retention on thoſe goods which, as ſhip-owner, he had lawfully or *bona fide* in his poſſeſſion.

It is true, prior to the exerciſe of this right, the ſugars were ſold to the purſuer; and if the property had been then transferred, the defenders claim would have been precluded. But, *traditionibus et uſucapionibus, non nudis pactis, dominia rerum transferuntur;* and it is not pretended that of thoſe goods any actual delivery was made. The indorſation of the bill of lading cannot be ſuppoſed to import a virtual tradition. It ſeems clear, that after goods are ſhipped, and the bills of lading tranſmitted, and in the hands of the purchaſer, and even by him indorſed again for an onerous cauſe, the original owner may recal the bills, and countermand the cargo, in conſequence of the intervening bankruptcy of the firſt purchaſer. If this is the caſe, it follows, that neither the tranſmiſſion nor indorſation of bills of lading is equivalent to delivery of the *ipſa corpora*.

Anſwered: Goods of one perſon put on board of the ſhip of another for tranſportation, continue ſtill in the civil poſſeſſion of their owner, and are not conſtrued to be in a legal ſenſe in the poſſeſſion of the maſter or of the proprietor of the ſhip. No doubt, theſe laſt may with-hold delivery of the cargo till the freight be paid; but this ariſes from the reciprocal nature of the contract, which forbids the demand of performance on the one part when it is not given on the other. And on the ſame footing ſtands an agent as to the papers of his client, or an innkeeper, ſtabler, or the keeper of fields for paſture, with reſpect to the property committed to their charge. This continuance of the

* The action likewiſe reſpected another and a larger quantity of ſugars; but it was in a different ſituation, and afforded no queſtion of importance.

civil poſſeſſion with the proprietor of the cargo, forms the diſtinction between the preſent queſtion and thoſe caſes quoted by the purſuer. In England the ſame effect of civil poſſeſſion has been admitted with reſpect to goods in the hands of an artificer for the purpoſe of manufacture; the claim of retention for the owner's debt being denied by the Court of King's Bench. Green *verſus* Farmer, 6th May 1768, Burrow's Rep. vol. 4. p. 2214.

The right of retention in queſtion, therefore, could not exiſt while the goods were on ſhip-board or until their landing. But before that time the property of them had been transferred from Monteath to the purſuer by the indorſation of the bill of lading: Nay, this transference was prior even to the making of the claim of retention; and ſooner the right will not be ſuppoſed to have commenced. The freedom of commerce requires that cargoes of goods ſhould be capable of ſale and transference while yet at ſea; and a more complete embargo can hardly be figured than that which the freighters latent claims of retention would produce. But the transference of property in that ſituation is not more expedient than conſonant to the principles of law. A ſhip freighted, in whole or in part, is a repoſitory belonging *quoad hoc* to the proprietor of the cargo; and the ſhip owner or maſter is the hand which takes charge of the repoſitory in his behalf. It is by means of this hand that he holds the poſſeſſion, the civil poſſeſſion, as it is called. Now, an indorſed bill of lading is no other than a declaration, that a contract has taken place, by which, in the room of the former, a new proprietor is ſubſtituted, by whom, of courſe, the poſſeſſion is now held, through the ſhipmaſter. He ſtands, therefore, now in the ſame ſituation with reſpect to the new proprietor in which he was before as to the former one. Here then is clearly a transference of the poſſeſſion of the things ſold from the ſeller to the purchaſer; which is all that was ſuppoſed wanting to complete the purſuer's right to the goods in queſtion. This doctrine accordingly received the ſanction of the Court, in the caſe of Buchanan and Cochrane *contra* Swan, 13th June 1764, Kames's Select Deciſions, N° 216; and of the Houſe of Peers, in that of Arthur *contra* Haſtie and Jamieſon, 10th April 1770.

The cauſe was reported by the Lord Ordinary; when

A majority of the Court were of opinion, That the proper poſſeſſion of the goods was held, not by the ſhipmaſter or owner, but through them, firſt by the ſhipper, and then by the indorſee to the bills of lading, *animi*; delivery of poſſeſſion being made in an effectual manner, and ſuch alone as the caſe was capable of; and therefore

" The Lords repelled the defences pleaded for Meſſ. Dunmore and " Company."

Reporter, *Lord Henderland.* Act. *Wight, A. Campbell.* Alt. *Rolland, Abercromby.*
Clerk, *Orme.*

S.

N° CCCVI.

N° CCCVI. *February* 3. 1787.

Major WILLIAM MAXWELL-MORISON,

AGAINST

DAVID PATULLO and Captain DAVID LAIRD.

PERSONAL AND TRANSMISSIBLE.—*A tenant being by the leaſe allowed retention of rent on account of a building to be erected on the lands, not found intitled to it out of rent due to his landlord, the building not taking place till after the lands were acquired by a purchaſer.*

BY a leaſe of lands granted by Major Maxwell-Moriſon to Patullo, the latter became bound to erect on the lands a houſe of certain preſcribed dimenſions; for which it was ſtipulated, on the other hand, that he ſhould have an allowance out of the rent of L. 50; a ſum inadequate, however, to the value of the building.

Major Maxwell-Moriſon ſold the lands to Captain Laird, whoſe entry to them was to be at Martinmas 1783, and the rent due by the tenant for crop 1783 was not payable before Whitſunday 1784; between which two periods the building of the houſe was begun and completed.

Major Maxwell-Moriſon having brought an action againſt Patullo, for payment of that year's rent, the latter pleaded retention under the ſtipulation above mentioned. In this action Captain Laird was afterwards called as a defender.

Pleaded for the purſuer: The building in queſtion, poſterior to the purchaſer's right, ſerved no other purpoſe but to benefit the lands; and of courſe the counter obligation muſt fall on the preſent proprietor, and not on the former, after his connection with them has ceaſed. It is clearly ſuch an obligation as affects ſingular ſucceſſors; and indeed the bargain was highly advantageous for the landlord. The circumſtance of the defender's having in his hands a rent belonging to the purſuer is plainly immaterial; ſo that there is no ground for the plea of retention. Accordingly ſuch was the deciſion of the Court, in the caſe of Arbuthnot *contra* Sir James Colquhoun. Wallace's Collection, 5th February 1772.

Anſwered: It is not ſufficient that the purchaſer was to reap the benefit of the building; this might equally have been ſaid, though it had been prior to his right. The obligation reſpecting the allowance of deduction from the tenant's rent was perſonal to the former proprietor,

prietor, and does not devolve on the preſent. In conformity to this plea, the Court decided the caſe of Macdowal *contra* Macdowal, 17th December 1760, Dict. of Deciſ. vol. 3. p. 78.

The Lord Ordinary found, "That the defender, David Patullo, had "a right to retain the foreſaid ſum of L. 50 from the rents of the "premiſſes contained in his leaſe, for building the houſe in queſtion." But

The Court altered that interlocutor, and repelled the plea of retention.

Lord Ordinary, *Swinton.* Act. *Abercromby.* Alt. *Wight.* Clerk, *Home.*

S.

N° CCCVII. *February* 4. 1787.

WILLIAM MASON,

AGAINST

WILLIAM THOM.

DILIGENCE—*preſtable by one employed to follow out legal diligence.*

WILLIAM THOM, Advocate in Aberdeen, was intruſted with a bill of exchange which had been accepted in favour of William Maſon, "for the purpoſe of doing ſuch diligence as to put the drawer "on an equal footing with the other creditors."

The debtor in the bill had a landed eſtate, which was covered with heritable ſecurities for debts amounting to L. 8000 Sterling. It was farther affected with two exiſting liferents, amounting to L. 150, and an eventual one of L. 50. It was ſold by a truſtee appointed by the debtor, but not before it had been adjudged by a conſiderable number of the perſonal creditors; among whom L. 3000, the reſidue of the price, after diſcharging incumbrances, being nearly a fourth part of what was due to them, was immediately divided. This was chiefly owing to the liferents having unexpectedly terminated between the execution of the truſt-deed and the payment of the price of the lands.

William Thom uſed inhibition on the ground of debt that had been intruſted to him; but as he neglected to adjudge, no part of the money

money could be recovered. An action of *damages* having been afterwards brought againſt him by William Maſon, he

Pleaded in defence: If a perſon in the ſituation of the defender has had the line of his conduct marked out to him by his employer, he cannot, it is true, deviate from it, without ſubjecting himſelf to the loſs thence ariſing. But otherwiſe, as a diſcretionary power is in general underſtood to be given, nothing but inexcuſable *negligence* on his part ought to have that effect. And as the defender's proceedings, in the preſent caſe, were dictated by the laudable purpoſe of avoiding an expence which he thought would be fruitleſs, and which his employer's circumſtances could very ill afford, ſuch a determination here would be extremely unjuſt, as well as inexpedient.

Anſwered: The line of conduct to be purſued by the defender was preſcribed with ſufficient accuracy. He was directed to uſe thoſe meaſures which were neceſſary for putting his conſtituent on an equal footing with the other creditors. But even although his inſtructions had been leſs preciſe, ſtill, as he muſt have known that after the greater part of the creditors had proceeded to adjudge, thoſe who did not would be altogether excluded, nothing but the moſt explicit orders from his employer could juſtify his doing what was equivalent to a renunciation of every hope of payment. Kilkerran, 8th February 1740, Macaul *contra* Vareils.

The Lord Ordinary ſuſtained the defences. But the queſtion having been brought under the review of the Court, the Lords altered that judgment. The circumſtance which ſeemed chiefly to weigh with the Court was this, that the defender had not given his employer an opportunity of judging for himſelf as to the expediency of leading an adjudication.

"The Lords found the defender liable in payment of a ſum equal "to that which the purſuer would have received, if an adjudication "had been led."

Lord Ordinary, *Alva.* Act. *Dean of Faculty.* Alt. *Solicitor-General, Blair.*
Clerk, *Sinclair.*

C.

N° CCCVIII. *February* 6. 1787.

ARCHIBALD MACAUSLAND,

AGAINST

WILLIAM DICK, WILLIAM BYRAM, and JOHN CAMERON.

NAUTÆ CAUPONES ET STABULARII.—*The owners of ſtage-coaches not anſwerable for the ſafe conveyance of money, unleſs where it has been delivered as ſuch.*

WILLIAM DICK, one of the owners of a ſtage-coach plying between Glaſgow and Edinburgh, received a parcel belonging to Archibald Macauſland. This he marked in the way-bill, with a charge of 6 d. which is the rate demanded for all ordinary parcels not exceeding a certain weight.

The parcel not having been delivered, Mr Macauſland brought an action againſt William Dick and his partners, for L. 200, alleged to have been contained in it; and

Pleaded: The caſe of carriers by land, though not ſpecially provided for by the edict of *Nautæ caupones et ſtabularii*, yet clearly falls within the ſpirit and meaning of that regulation; and the obligation it creates does not depend on the value of the goods. If theſe have been *received*, action muſt be ſuſtained for *redelivery*. This is confirmed by the uſage of modern nations, and likewiſe by the conduct of the owners of ſtage-coaches in Scotland, who generally take care to expreſs, by a particular advertiſement, to what extent they are to be underſtood to warrant the ſafety of goods entruſted to their care. *L.* 1. § 4. 6. *ff. Naut. Caup. et Stab.; l.* 7. *ibid.;* Stair, book 1. tit. 4. § 44.; Blackſtone, vol. 3. tit. 9. p. 164.

Anſwered: The owners of ſtage-coaches do not in general undertake the conveyance of money, becauſe they have no proper repoſitory for it, and becauſe it is almoſt impoſſible for them to provide againſt the frauds or miſconduct of the paſſengers. This article for the moſt part is, and always ought to be tranſmitted by a waggon, in which there is a place fitted up for the purpoſe. There, too, it is uſual to proportion the rate of carriage, not to the *bulk* only, but alſo to the *value* of the goods. The conſequence of admitting the preſent claim, would be to ſubject people in the defenders ſituation to a hazard which did not fall within their agreement, and for which, of courſe, a correſponding premium could not be ſtipulated.

It

It was alſo argued for the defenders, That the edict ought not to be extended to carriers by land. But the caſe was determined on this principle, That the owners of ſtage-coaches, or other carriages for hire, were not reſponſible for the ſafe conveyance of money which had been delivered as an ordinary parcel.

"The Lords ſuſtained the defences, and aſſoilzied."

Lord Reporter, *Eſkgrove.* Act. *Dean of Faculty, Hope.* Alt. *Maclaurin, J. Dickſon.* Clerk, *Home.*

C.

N° CCCIX. *February* 6. 1787.

JAMES ROBERTSON, and others,

AGAINST

CHARLES MACGLASHAN.

BILL OF EXCHANGE.—*Bills now retain their extraordinary privileges for ſix years.*

IN 1774, Macglaſhan adhibited his ſubſcription, as acceptor, to a bill of exchange, which was afterwards, in 1779, indorſed to Robertſon and others. At this laſt period, Macglaſhan was creditor to the indorſer in ſums far exceeding thoſe contained in the bill.

An action having been brought at the inſtance of the indorſees, againſt Macglaſhan, he

Pleaded: It has long been a fixed point, that the extraordinary privileges attending bills of exchange are loſt, when theſe have lain over for *three* years. After this, inſtead of being viewed as bags of money, which paſs from hand to hand, unaffected by any objections that might be competent againſt former holders, they are to be conſidered as mere grounds of debt, with regard to which the *aſſignee* cannot be in a better ſituation than the *cedent*. Thus the ſame plea of compenſation that could have been ſucceſsfully uſed againſt the indorſer of the bill in queſtion, muſt be equally available againſt his indorſees. Erſkine, book 3. tit. 2. § 37.

Anſwered: At any time prior to the year 1772, the defender's argument would have been of conſiderable weight; but as bills of exchange have ſince been declared, during *ſix* years, to be legal and probative

bative documents, no reaſon can be aſſigned, why the duration of their extraordinary privileges ſhould be limited to a ſhorter period.

The plea urged for the purſuer had been formerly recogniſed by the Court, though no preciſe determination had ever been given on the point.

The Lords adhered to the judgment of the Lord Ordinary, "in "repelling the defences."

Lord Ordinary, *Rockville.* Act. *C. Hay.* Alt. *Geo. Ferguſſon.* Clerk, *Menzies.*

C.

N° CCCX. *February* 6. 1787.

THOMAS CARRICK,

AGAINST

ROBERT KEY.

DELIVERY. BILL OF EXCHANGE.—*To tranſmit the right of a bill of exchange to an indorſee, delivery of the bill itſelf is not indiſpenſably neceſſary.*

THOMAS CARRICK ſued for delivery of a bill of exchange for 1000 merks, drawn by the father of the defender, Robert Key, and afterwards by him indorſed to the purſuer, who was his grandſon by a daughter, and at that time under age.

The drawer had about the ſame time indorſed a bill for 2000 merks to another of his daughters. He had alſo indorſed a bill for 1000 merks to the purſuer's mother. Both theſe bills he had delivered to the indorſees; but the bill in queſtion had remained in his cuſtody till a ſhort time before his death, when he delivered it, with ſeveral other writings, to Robert Key, his only ſon, and general diſponee, without giving particular directions as to the diſpoſal of any of them.

Pleaded for the defender: In order to prove the tranſmiſſion of a right of debt from one perſon to another, the deed executed for this purpoſe muſt be delivered, or ſome other act performed, which in the contemplation of law is held equivalent to delivery. The mere indorſation of a bill of exchange, without giving over the voucher itſelf to the indorſee, or to ſome perſon for his behoof, cannot be thought

thought ſufficient. Though this may lead to a belief, that the creditor had at one time ſome deſign of beſtowing a part of his effects in this way, it muſt be preſumed, from his ſubſequent conduct, that he had afterwards altered his purpoſe; Kames's Elucid. p. 26. The circumſtance, of the deceaſed having, in the preſent inſtance, put the document itſelf, a ſhort while only before his death, into the hands of the defender, who was to be his general repreſentative, ſeems to ſtrengthen this ſuppoſition.

Anſwered: In the caſe of deeds executed in favour of near relations, when framed in ſuch a manner as to import an immediate transference of the right, no delivery is required. While writings of this ſort continue in the cuſtody of the granter, they muſt no doubt be ſubject to revocation; but without ſome act for this purpoſe, the reaſonable preſumption is, that they were meant to be effectual. This reaſoning, indeed, is here very ſtrongly confirmed by the peculiar circumſtances of the caſe. It was extremely juſt, that a bequeſt of the extent of the one here claimed ſhould be made in favour of the purſuer, as the bill in queſtion, together with another of the ſame amount, given to his mother, ſerved only to put that part of the family of the deceaſed on an equal footing with the reſt. At the ſame time, many reaſons may be figured for not giving any notice to the indorſee, then a very young man, of his having right to a ſum of money, which was to be at his abſolute diſpoſal.

The queſtion was reported to the Court; when it was

Obſerved on the Bench: As the property of *ipſa corpora* is not tranſferred without delivery, ſo where a right of debt is to be tranſmitted, the writing uſed for this purpoſe, if contained in a ſeparate deed, muſt, in order to make the transfer complete, be delivered to the grantee, or to ſome perſon for his behoof. But where the conveyance, being contained in the ſame writing, is inſeparable from the document of debt itſelf, the ſame rule does not hold. This is analogous to the caſe of a diſcharge, or declaration of truſt, written on the back of a bond for borrowed money, which muſt create an inherent qualification of the debt.

" The Lords repelled the defences."

Reporter, *Lord Eſkgrove.* Act. *A. Campbell.* Alt. *G. Ferguſſon.* Clerk, *Home.*

C.

N° CCCXI. *February* 10. 1787.

ALEXANDER PARK and GEORGE BROWN,

AGAINST

JOHN BENNET.

MEDITATIO FUGÆ.—*A warrant for incarceration may, on that ground, be obtained againſt one who has retired to the ſanctuary.*

ALEXANDER PARK and George Brown, two of the creditors of John Bennet, who had retired to the Abbey, made oath before the bailie, That they believed he had gone thither to have an opportunity of leaving the kingdom, and thus diſappointing the demands of his creditors.

John Bennet was examined by the bailie; and on his refuſing to give ſecurity for his remaining in Scotland, he was committed to the jail of the Abbey. Afterwards, in conſequence of an application to the Lord Ordinary on the bills, in which it was ſtated, that the creditors intended to bring Bennet to trial as a fraudulent bankrupt, and that the Abbey jail was inſufficient for the purpoſe of ſecuring his perſon, a warrant was obtained for removing him to the priſon of Canongate.

Obſerved on the Bench: The privilege of the ſanctuary would be greatly perverted, if it could be uſed as a means of a bankrupt's eſcaping from Scotland, and thus evading altogether the demands of his creditors. The bailie of the Abbey, therefore, with regard to thoſe who take refuge within his juriſdiction, muſt be warranted, in the ſame manner as the other ordinary judges, to uſe the neceſſary precautions for preventing wrongs of this ſort.

After adviſing a reclaiming petition for John Bennet, with anſwers for the creditors, which were followed with replies and duplies, the Lords affirmed the interlocutor that had been pronounced by the Lord Ordinary.

Lord Ordinary, *Henderland.* For Bennet, *A. Fergusſon.* Alt. *Jo. Clerk.*
Clerk, *Colquhoun.*

C.

N° CCCXII.

N° CCCXII. *February* 10. 1787.

ALEXANDER WALKER,

AGAINST

JAMES GAVIN.

SALE.—*Condition, That if the higheſt offerer at the ſale does not find caution within a limited time, the purchaſe ſhould devolve on the next offerer, how interpreted.*

BY the articles of roup of the lands of Mainſneil, which were ſold judicially, it was provided in the uſual manner, " That on the " higheſt offerer failing to give ſecurity for the price within thirty " days after the ſale, the one next to him ſhould be *preferred*, on his " finding ſecurity within thirty days after; intimation being at the " ſame time to be made to him of the devolution in his favour within " ten days after it had taken place."

The higheſt offerer was Mr Gavin, who, by ſome overſight, allowed the thirty days to elapſe. The day after, however, he offered a bond, ſigned by proper cautioners; but not before Mr Walker, whoſe offer was next to his, had inſiſted on being preferred in purſuance of the above condition. Minutes of debate were made out, in which Mr Walker

Pleaded: Articles of roup form a mutual contract between the expoſers and offerers, by which all the parties are equally bound. Since, therefore, Mr Walker was here unqueſtionably obliged, on the failure of his competitor, to fulfil the offer he himſelf had made; ſo the expoſers muſt be under a ſimilar obligation to perform their part of the agreement. This indeed is clearly implied in the words here uſed; the bidder next to the higheſt being to have the *preference* on the failure of this offerer, in the ſame way as, before, he was to be *preferred* on his performing the conditions required from him. It is true, that the perſon who carries on the ſale is obliged to make intimation, within a limited time, to the offerer on whom the purchaſe has thus devolved; but this was intended for the accommodation of the latter, and not to give to the former an arbitrary power of preferring one offerer to another.

Anſwered for Mr Gavin: The clauſe which gives riſe to the preſent queſtion

queſtion has been inſerted in judicial ſales, the expence of which is very great, in order to provide againſt the neceſſity of a ſecond roup, in caſe the higheſt offerer ſhould be found unable to pay the ſtipulated price. It is ſolely intended for the benefit of the expoſers; and hence, if they do not, within a ſhort period, notify to the preceding offerer, that they mean to avail themſelves of it, it is held to be of no conſequence. If, therefore, they chuſe, even after the day fixed for that purpoſe, to accept of the ſecurity proffered by the higheſt bidder, or if they think it unneceſſary to demand ſecurity of any ſort, no other perſon has any right to interfere.

"The Lords preferred Mr Gavin the higheſt bidder."

Reporter, *Lord Swinton.* For Mr Walker, *J. Erſkine.* For Mr Gavin, *C. Hay.*
Clerk, *Colquhoun.*

C.

N° CCCXIII. *February* 20. 1787.

WILLIAM MACDOWAL,

AGAINST

GEORGE BUCHANAN.

MEMBER OF PARLIAMENT.—*A freehold-qualification found to be* nominal *and* fictitious.

MR SPEIRS of Elderſlie held his eſtate in the county of Renfrew under a ſtrict entail, by which the granting of wadſets or liferents of the ſuperiority was expreſsly prohibited.

As this ſtood in the way of his creating freehold-qualifications, Mr Speirs obtained from ſuch of the exiſting heirs of entail as were of age, and from the tutors and curators of thoſe who were minors, an obligation, whereby, on the narrative, "That the liferent-conveyances propoſed by Mr Speirs were not within the *meaning*, though "within the *words* of the prohibition, ſince they were not attended "with any *deterioration* of the eſtate, but, on the contrary, might "increaſe the *influence* of his family," they became bound to refrain from bringing any action againſt him on that account; and likewiſe, in caſe of any challenge by the after exiſting heirs of entail, by which

which the eſtate might devolve on them, to account to him for the rents, as if no forfeiture had been incurred.

This obligation, or deed of conſent, was ſubſcribed by Mr George Buchanan, as curator of ſome of the heirs of entail. He afterwards accepted one of the liferent-eſtates created by Mr Speirs, the yearly produce of which was only $6\frac{8}{12}$d. Sterling. He was inrolled as a freeholder at the meeting for election in 1786, and took the oaths preſcribed by law.

Mr Macdowall, a freeholder in the county, complained to the Court of Seſſion of this inrolment, inſiſting, that Mr Buchanan's qualification was *nominal and fictitious*. In ſupport of this objection, it was

Pleaded: In Scotland the right of chuſing repreſentatives to ſerve in parliament has ever been ſo conſtituted, as to afford at the ſame time a proof of the intereſt which the elector has in the welfare of the ſtate, and a pledge for the independence of his conduct. Thus it has been required, that he ſhould be poſſeſſed of a landed eſtate of ſome value. It has been farther eſtabliſhed, in order to preſerve an equality among the perſons intitled to this important privilege, that the influence of each landholder ſhould not be in proportion to the extent of his property, but that every one truly poſſeſſed of the legal qualification ſhould have the ſame weight in the national councils.

A formal promulgation of theſe rules, which reſult from the original frame of our government, was not neceſſary. Indeed, as attendance in parliament was at firſt eſteemed a burden, rather than a privilege, it would be ſingular if any limitation of this ſort had exiſted. But afterwards, when it became an object of ambitious purſuit, the Legiſlature interpoſed, for correcting the abuſes which had thus been introduced, and bringing back the ſyſtem of election to its conſtitutional baſis. As it was at firſt attempted to fabricate illicit qualifications, by means of *redeemable* rights, wherein the elector was entirely ſubject to the will of the perſon from whom the qualification had been obtained, or by conveyances in *truſt*, in which the feudal eſtate, though *apparently* in the voter, was, as well as the right of voting, *ſubſtantially* in another, the ſtatute 10th Anne, c. 6. was enacted, for declaring, in terms of the common law, that neither *redeemable* nor *confidential* eſtates afforded a proper right of voting. For the more ſpeedy diſcovery alſo of thoſe diſabilities, which did not appear from the writings exhibited to the freeholders, every claimant was required to ſwear, that he did not hold the eſtate in truſt, or under an obligation to reconvey.

Afterwards new methods of creating fraudulent qualifications were deviſed, the eſtate conveyed to the intended voter being ſo inconſiderable as to render an expreſs limitaton of his right unneceſſary.

As the words of the oath impoſed by the act of Queen Anne were not underſtood to reach this caſe, the act 7th Geo. II. c. 16. ſubſtituted another in its place. By this laſt ſtatute, all qualifications not founded on a ſubſtantial title of property were declared to be contrary to law; the freeholder being required, under a forfeiture of his right of voting, to ſwear, that his eſtate was not *nominal* and

fictitious. In the ſame manner, as every freeholder was obliged to ſwear that he did not hold the eſtate in *truſt*, or for the *behoof of another*, thoſe were, as formerly, precluded who either poſſeſſed the feudal eſtate, or the right of voting in that way. The ſtatute went ſtill farther: For, in order to prevent the partition of landed property with a view merely to create rights of voting, it required the freeholder to ſwear, that his eſtate was not *created* or *reſerved* in him for this purpoſe.

While, however, the Legiſlature was thus endeavouring to preſerve the right of election in thoſe to whom the conſtitution had intruſted it, it never could be in view, by rendering the oath impoſed by 7th Geo. II. the only criterion in queſtions of this ſort, and thereby making every claimant the ſole and excluſive judge of his own conduct, to increaſe thoſe abuſes which already exiſted. The oath was introduced merely as a *teſt*, by which, without precluding thoſe more formal methods of inveſtigation that might ariſe from the particular circumſtances of every caſe, the queſtion might at once be brought home to the conſcience of the voter. So the oaths of bribery and corruption, which may be tendered at the election of members of parliament, and on other ſimilar occaſions, have never been underſtood to prevent any perſon intereſted from afterwards eſtabliſhing the actual commiſſion of thoſe crimes. It is indeed true, that a claimant, having once taken the ſtatutory oath, is not obliged to anſwer particular interrogatories, ſo as to involve him in perjury; and on this principle any deciſions which may be quoted on the other ſide have evidently proceeded. But where the fraudulent nature of the qualification is clearly diſcernible from the right itſelf, and ſtill more where the objection ariſing from the unproductive ſituation of the claimant's eſtate, as appearing from his title-deeds, is confirmed by other circumſtances, a very different determination muſt be given. In the preſent inſtance, not one only, but all the requiſites of a legal qualification, are wanting. The conveyance in favour of the claimant, far from creating in him a ſubſtantial right of property, is evidently ſuch as no one would accept of, unleſs for the purpoſe of a right to vote. And beſides, he has in effect acknowledged, that he does not hold it for himſelf, or for his own behoof, but dependent on the *will*, and for increaſing the *political influence* of another.

Anſwered: The parliamentary repreſentation of Scotland, as well as the form of our government, derives its original from the Feudal ſyſtem.

At firſt every immediate vaſſal of the Crown was obliged, in perſon, to attend the King's baron-courts. Afterwards thoſe poſſeſſed of ſmaller eſtates obtained an exemption; but even when theſe were, in proceſs of time, excluded, and when, in lieu of perſonal attendance, they were authoriſed to ſend repreſentatives, this was not regulated by the yearly income of each Crown's vaſſal, which was often greatly impaired by ſubinfeudations, but by the public ſubſidies due out of the lands. Act 1427, c. 101.; 1429, c. 127; 1457, c. 75.; 1503, c. 78.; 1537, c. 33.; 1587, c. 114.

The ſtatute of 1661, c. 35. may perhaps appear to have occaſioned a deviation from the general rule, by requiring the voter to be poſſeſſ-

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ed of ten chalders of *victual*, or L. 1000 of yearly income; but this only took place where the *old extent*, the rate by which the taxes were anciently levied, was not known; and by act 1681, c. 21. which was in 1707 made a fundamental article of the Union of the two kingdoms, it was determined, that liferents or wadſets of ſuperiority holding of the Crown, and of the requiſite valuation either according to the *old extent*, or according to the *valued rent*, which is now the rule in exacting the land-tax, ſhould, without any regard to the intrinſic worth or yearly produce of theſe rights, afford an unexceptionable title to vote.

Thus the deſign that has been aſcribed to the Scottiſh Legiſlature, of annexing political influence to real property, and of reſtraining ſuch conveyances as might be made for the ſole purpoſe of conferring a right to vote, appears to be altogether imaginary. Nor were the Britiſh ſtatutes of 10th Anne, and 7th Geo. II. intended to alter this part of our conſtitutional law. Theſe enactments, beſides diſabling perſons holding *redeemable* eſtates, were calculated to prevent the creation of *nominal* and *colluſive* qualifications, in which either the voter did not truly hold the eſtate as it was deſcribed in his title deeds, or was tied down by an expreſs agreement, or at leaſt by ſome tacit underſtanding, to exerciſe the right of election at the *will* or for the *behoof* of another. But a qualification, in which the claimant has in his perſon every right which the writings exhibited for him import, cannot be held to be *nominal and fictitious*. And although he may have acquired the eſtate for the purpoſe of voting, this will not diſqualify him, if he can ſwear that this was done for his own behoof. Otherwiſe, indeed, this valuable privilege might be confined to thoſe who are quite indifferent to the good of the community, or be entirely annihilated.

To this reaſoning the peculiar ſituation of thoſe judicatories in which all queſtions concerning freehold-qualifications muſt be determined, gives additional force. Anciently the freeholders themſelves, at their head-courts, were the only judges in matters of this ſort; and the law required the *Feudal titles* of each claimant to be exhibited before them. But as, prior to the acts of Queen Anne and Geo. II. they had no authority to examine either the perſon demanding inrolment, or third parties, as to the *purpoſe* of the qualification, ſo the oaths introduced by theſe ſtatutes afford the only method of inveſtigation which they can now uſe, in order to diſcover whether a qualification be fraudulent or not. And as no court judging by way of appeal can determine on evidence which neither was nor could be produced in that in which the queſtion was originally tried; ſo it is not in the power of the Court of Seſſion, after a claimant has, at a meeting of freeholders, taken the requſite oaths, to enter into any farther inquiry.

According to theſe principles almoſt every queſtion that has occurred has been determined in the Court of Seſſion; and where a contrary deciſion was given, it has been uniformly reverſed in the Houſe of Lords. Thus liferents or wadſets of the ſuperiority alone, or even thoſe in which the feu-duties as well as the caſualties of ſuperiority had been renounced,

ced, or ſuch as had been granted by an heir of entail, the limitation of whoſe right appeared from the inveſtitures of the claimant, have been found to conſtitute an unexceptionable freehold-qualification; while every attempt to ſhew, from circumſtances of an extrinſic nature, either acknowledged by the party himſelf, or aſcertained by other evidence, that the eſtate had been *created* or *reſerved* in him for the mere purpoſe of giving a right to vote, has been fruſtrated. In the preſent caſe, no obligation has been impoſed on the freeholder, either to reconvey the feudal eſtate, or to exerciſe his right of voting at the will of another perſon; and he has farther ſworn, that he has come under no engagement inconſiſtent with the external appearance of his right. 30th July 1745, Burnet of Crigie *contra* the Freeholders of Aberdeenſhire; 20th July 1746, Ferguſſon of Craigdarroch *contra* the Freeholders of Dumfriesſhire; 24th June 1747, Stewart of Barvennan and Hay of Balcarry *contra* the Freeholders of Wigtonſhire; 9th January 1755, Forreſter of Denovan *contra* Fletcher of Salton; 5th July 1760, Lauchlan Grant *contra* Campbell and others; 28th July 1761, Stewart *contra* Dalrymple; Houſe of Lords, 9th May 1770, George Skene *contra* David Wallace.

When the queſtion between theſe parties came to be determined, a ſeparate objection was ſtated by one of the Judges, on account of the form of the writings employed in the conſtitution of the claimant's right. Mr Speirs, the granter, had, as uſual, conveyed the *property* of his lands to a *truſtee*, who took infeftment. He afterwards obtained from the Crown a new charter of the *ſuperiority*, containing a precept of ſeiſin, which he aſſigned in *liferent*, as far as was neceſſary, to the ſeveral intended voters. After the liferenters were infeft, the truſtee reconveyed the *property* to Mr Speirs, who in this way became *fiar* of the *ſuperiority*, and *proprietor* of the lands. This, it was, ſaid was quite inconſiſtent with feudal principles, and equally ſo with the law of election, which, with regard to qualifications founded on rights of ſuperiority, required that there ſhould be a proper vaſſal, by whom the accuſtomed preſtations might be performed. The practice of ſeparating the property from the ſuperiority, as had been done in this caſe, was ſaid to originate from this cauſe.

By a majority of the Judges, however, this objection was not thought to be well founded. They obſerved, that there was no inconſiſtency, even according to the ſtricteſt feudal ideas, in one perſon being at the ſame time *ſuperior* and *vaſſal* in the ſame lands; and this often happened in caſes altogether unconnected with political conſiderations. The previous ſeparation of the property and ſuperiority, too, in the conſtitution of freehold-qualifications, was only *conſequentially* neceſſary, that the voter might be able to ſwear, that he was in poſſeſſion of all the right that his *titles* imported, which he could not do if, after being fully veſted both in the *property* and *ſuperiority* of the lands, he had reconveyed the former to the perſon from whom he had obtained it.

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With regard to the general queſtion, a great difference of ſentiment prevailed. By ſome of the Judges it was thought, that on account of the former deciſions, the objection here urged was inadmiſſible; and that it was only by the oath introduced by 7th Geo. II. that an inquiry could now be inſtituted, to diſcover whether a qualification, *ex facie* regular, and not limited by any proper deed of defeaſance, was fraudulent or not.

Others of the Judges were of opinion, that as the writing ſubſcribed by the claimant did not, in this caſe, afford ſufficient evidence of his holding the eſtate conveyed to him, in truſt for the granter, or under an obligation to vote according to his wiſhes; ſo the objection of nominality, ariſing from the ſmall value of the right, conſidered merely in a pecuniary view, was not founded in the principles of our election-law. It might have been wiſe in our forefathers, it was ſaid, to require from each elector a proof of his independence, and of his intereſt in the welfare of the community; but they had not been influenced by conſiderations of this ſort. The right of voting, independently of any patrimonial advantage, had been made a valuable eſtate, and the ſubject of commerce: and although, from the great change of manners, this was now the occaſion of many inconveniencies, it did not belong to courts of juſtice to apply a remedy, by giving a different effect to a ſtatutory right than was originally intended by the Legiſlature itſelf.

Some of the Judges, again, who conſidered the objection as well founded, ſeemed to lay the ſtreſs of their opinion on the ſtatutes 10th Ann. and 7th Geo. II. Although by the act 1681 no proviſion was made againſt fraudulent qualifications, becauſe they were at the time unknown, this, it was ſaid, had been effectually remedied by the ſubſequent ſtatutes in 1710 and 1735, which not only marked out the circumſtances by which the legal qualifications might be diſtinguiſhed from thoſe of a different diſcription, but alſo eſtabliſhed one mode of trial, by which thoſe circumſtances might be diſcovered in the court of freeholders, without, however, limiting the judicatories in which the queſtion might afterwards be diſcuſſed from reſorting to others equally ſatisfactory. It would have been a moſt impolitic regulation, to put it into the power of every one poſſeſſed of an illicit qualification, by taking the oath at the requiſition of a perſon in the ſame intereſt, to place his conduct beyond the reach of challenge. It would alſo be contrary to the general principles of the law of Scotland, in which *fraud* may be proved by every ſort of evidence which the circumſtances of the caſe afford. From the former deciſions it was farther ſaid, no proper precedent could ariſe. It was the nature of fraud to aſſume various colours and diſguiſes; and it could not with any reaſon be thought, that becauſe in one or more inſtances the detection had appeared to be incomplete, no attempt of the ſame kind was ever afterwards to be permitted.

Others of the Judges, concurring in the ſame opinion as to the il-

legality of ſuch qualifications as the preſent, conſidered them to be contrary to the ſtatute of 1681; and that as it was then meant to annex this valuable right to landed property, and to give only one vote to each proprietor, ſo every contrivance framed to evade this purpoſe was a fraud againſt the law, and of courſe illegal and inept. If thoſe unreal qualifications which were now in uſe had exiſted in 1681, it could not be imagined that the ſtatute would have been ſilent on that head. It therefore could not be deemed an improper exerciſe of authority, in Judges directed, not merely by the words, but alſo by the meaning of the Legiſlature, to give that effect to this ſtatute which was neceſſary for maintaining the rights of election on a proper footing.

The judgment of the Court was in theſe words:

" The Lords having conſidered the petition and complaint, with " the anſwers thereto, and having heard parties procurators in their " own preſence, and having adviſed the memorials *hinc inde*; they " find, That the reſpondent's qualification is *nominal* and *fictitious*, and " ſuſtain the objection to his inrolment: Find, That the freeholders " did wrong in admitting him to the roll; and ordain his name to " be expunged."

For the complainer, *Lord Advocate, Blair, Geo. Ferguſſon, Honyman.*
For the reſpondent, *Dean of Faculty, Wight, Maclaurin.* Clerk, *Robertſon.*

C.

N° CCCXIV. *February* 20. 1787.

WILLIAM MACDOWALL,

AGAINST

ANDREW BUCHANAN.

MEMBER of PARLIAMENT.—*Objection of* nominality *ſuſtained.*

MR ANDREW BUCHANAN was, at the meeting for election in 1786, inrolled as a freeholder in the county of Renfrew.

His freehold, which was obtained from Mr Spiers, ſtood preciſely on the ſame footing with that of Mr George Buchanan *; with this only difference, that he had not ſubſcribed the *deed of conſent* executed

* See the preceding caſe.

ted by the heirs of entail. But he was not ignorant of the tranſaction, a copy of the deed having, before his inrolment, been read over to him.

A majority of the Lords were of opinion, That as the freehold-qualification of Mr George Buchanan had been found to be *nominal* and *fictitious*, the one in favour of Mr Andrew Buchanan could not be viewed in a different light.

After adviſing a complaint in the name of Mr Macdowall, with anſwers for Mr Buchanan,

The Lords found, "That the freeholders did wrong in admitting "Andrew Buchanan to the roll of freeholders, and ordered his name "to be expunged."

Act. *Lord Advocate*, et alii. Alt. *Dean of Faculty*, et alii. Clerk, *Robertſon*.

C.

N° CCCXV. *February* 20. 1787.

JOHN CAMPBELL and ARCHIBALD TOD,

AGAINST

The Honourable WILLIAM ELPHINSTONE.

MEMBER OF PARLIAMENT.—*Objection of* nominality *ſuſtained.*

MR ELPHINSTONE was admitted to the roll of freeholders in the county of Renfrew, at the meeting for election in 1786. His titles, derived from Mr Shaw-Stewart, proprietor of the eſtate of Greenock, who was fettered by an entail of the ſtricteſt ſort, imported a bare liferent of ſuperiority, the pecuniary advantages of which were nowiſe adequate to the expence of making out the neceſſary writings.

A majority of the Judges were of opinion, That the qualification grounded on theſe titles was *nominal* and *fictitious*. A conveyance from the proprietor of an entailed eſtate, it was obſerved, might, in ſome inſtances, afford an unexceptionable right to vote. But in diſtinguiſhing *real* qualifications from ſuch as were *nominal* and *fictitious*, the circumſtance of the perſon from whom the right was obtained being

being under reſtraints of this ſort, had a conſiderable weight, as it could hardly be doubted, that the grantee was at leaſt under an *implied* obligation to reconvey his right whenever this became neceſſary to prevent a forfeiture. And when to this was joined the preſumption ariſing from the limited nature of the right itſelf, it was impoſſible to conſider it as one to which the Legiſlature meant to annex a right of voting.

The Lords found, "That Mr Elphinſtone's qualification was *nominal* and *fictitious;* and that the freeholders did wrong in admitting him to the roll."

Act. *Lord Advocate*, et alii. Alt. *Dean of Faculty*, et alii. Clerk, *Robertſon*.

C.

N° CCCXVI. *February* 20. 1787.

JOHN CAMPBELL, and others,

AGAINST

WILLIAM INGRAM.

MEMBER OF PARLIAMENT.—*Objection of* nominality *ſuſtained.*

THE right in virtue of which Mr Ingram was admitted to the roll of freeholders in the county of Renfrew, was a naked liferent of ſuperiority, created only a few years before. The feu-duty did not exceed ten ſhillings, and the caſualties were taxed at double the feu-duty.

The Lords, on a complaint, preferred in the name of John Campbell, and others, "found, That the freeholders did wrong in admitting 'Mr Ingram to the roll; and ordered his name to be expunged."

Act. *Geo. Ferguſſon*, et alii. Alt. *Dean of Faculty*, et alii. Clerk, *Robertſon*.

C.

N° CCCXVII.

N° CCCXVII. *February* 20. 1787.

WALTER SCOTT and ARCHIBALD TOD,

AGAINST

JOHN MILLAR.

MEMBER OF PARLIAMENT.—*Objection of* nominality *over-ruled.*

THE ſuperiority of the lands of Ardgowan, belonging to Sir Michael Stewart, was conveyed by him to Mr John Millar; whom failing, to Mr Shaw Stewart, Sir Michael's eldeſt ſon, his heirs and aſſignees whatſoever; and this, with the exception of a liferent which had been formerly made over to another perſon. The yearly feu-duties amounted only to L. 2 : 14 : 8½ Sterling.

In virtue of this conveyance, Mr Millar was inrolled among the freeholders of the county of Renfrew, as fiar of the ſuperiority of the above mentioned lands, to vote in the abſence of the liferenter.

In a complaint preferred in the name of Walter Scott and Archibald Tod, on occaſion of theſe proceedings, it was

Pleaded: It is now held, that a qualification founded on a *liferent* of ſuperiority is *nominal* and *fraudulent*, when the produce of the right is ſo very inconſiderable as not to defray the expence of the neceſſary writings. A *fee* of ſuperiority, of an equal extent, muſt certainly be judged of in the ſame manner. The conveyance in *perpetuity* of a right which is of no value, cannot be diſtinguiſhed, in point of nominality, from a grant of the ſame right to be held during the *lifetime* of the grantee. In truth the *fee* in the preſent caſe is, if poſſible, more *nominal* than the *liferent;* for with regard to this laſt, the holder may, at leaſt during his life, recover from the vaſſal the annual preſtations, ſuch as they are; which the *fiar*, if he do not ſurvive the *liferenter*, will never have an opportunity of doing.

Anſwered: There is nothing in the preſent caſe which can difference the fee of ſuperiority held by Mr Millar from thoſe of the ſame nature, which are expreſsly recogniſed by the ſtatute of 1681, and which have ever ſince been held to conſtitute an unexceptionable freehold-qualification. As to the clauſe of ſubſtitution in favour of Mr Shaw Stewart, it has been repeatedly determined, That this is merely of the nature of a *deſtination*, alterable by the immediate holder of the right, and of which the perſon favoured cannot avail

himſelf, without becoming liable, as heir of proviſion, for the debts of his predeceſſor.

It was ſeparately objected to this inrolment, That by the retour referred to in the claim which had been exhibited for Mr Millar, the lands had been valued along with the offices of *coroner* and *mair* of *fee*, which were now in diſuſe, and which, at any rate, could not give a freehold-qualification. But to this it was thought a ſufficient anſwer, *1ſt*, That in the retour above mentioned no value had been put on theſe offices, the total amount of the ſums in the *valent*, preciſely agreeing with the value of the other articles, as ſpecified in the *deſcriptive* clauſe; and, *2dly*, That by another retour, which, though not mentioned in the claim, had been produced in the freeholders court, it had been certified, "*Quod dicta officia coronatoris et maris* "*feodi, &c. nunc valent per annum debito exercendo ſui ſervitii, et tantum* "*valuerunt tempore pacis.*"

"The Lords diſmiſſed the complaint."

Act. *Geo. Ferguſſon*, et alii. Alt. *Maclaurin*, et alii. Clerk, *Robertſon*.

C.

N° CCCXVIII. *February* 20. 1787.

JOHN LAMONT and JAMES CAMPBELL,

AGAINST

JOHN ALSTON *junior*.

MEMBER OF PARLIAMENT.—*Objection of* nominality *over-ruled.*

THE feudal titles in virtue of which Mr Alſton *junior* was inrolled among the freeholders of the county of Renfrew, imported only a liferent of the ſuperiority, which, conſidered merely as a patrimonial right, was equally *nominal* with any of thoſe which had been rejected by the Court.

But it appeared that the firſt ſeparation of the property from the ſuperiority, which took place about thirty years before, had not originated from any political motives.

On this ground, after adviſing a petition and complaint, in the name

name of John Lamont and James Campbell, with anſwers for Mr Alſton *junior*,

" The Lords repelled the objection, and diſmiſſed the complaint."

Act. *Dean of Faculty*, et alii. Alt. *Blair*, et alii. Clerk, *Robertſon*.

C.

N° CCCXIX. *February* 20. 1787.

JOHN ROEBUCK *junior*,

AGAINST

Sir WILLIAM CUNNINGHAM, and others.

MEMBER OF PARLIAMENT.—*Objection of* nominality *over-ruled.*

MR ROEBUCK claimed to be inrolled as a freeholder in the county of Renfrew, his right being a liferent of ſuperiority, conſtituted by a recent ſeparation of the property from the ſuperiority, for the obvious purpoſe of creating a freehold-qualification.

But the annual feu-duties exigible by Mr Roebuck were conſiderable, amounting to L. 71 : 7 : 8 Scots; and the caſualties of ſuperiority were not taxed.

The freeholders having refuſed to admit Mr Roebuck, the Lords, after adviſing a petition and complaint, with anſwers,

" Found, That the freeholders did wrong, and ordained Mr Roe-
" buck's name to be added to the roll."

Act. *Geo. Ferguſſon*, et alii. Alt. *Dean of Faculty*, et alii. Clerk, *Robertſon*.

C.

N° CCCXX.

N° CCCXX. *February* 20. 1787.

WILLIAM MACDOWALL,

AGAINST

GEORGE CRAWFORD.

MEMBER OF PARLIAMENT.—*Objection of the eſtate being* reſerved *in the freeholder for the purpoſe of giving him a right to vote.*

IN the year 1781, George Crawford was inrolled among the freeholders of the county of Renfrew, as ſuperior of the lands of Langſide.

In the year 1783, he conveyed his right in theſe lands by a diſpoſition, containing a procuratory of reſignation, and a precept of ſeiſin, to Lord Sempill, who immediately took infeftment in virtue of the precept.

So matters continued till the year 1786, when an objection was regularly lodged by Mr Macdowall to Mr Crawford's continuing on the roll. And, on 9th October of that year, being the day before the meeting for election, Lord Sempill executed a procuratory of reſignation, *ad remanentiam*, in the hands of Mr Crawford, and the inſtrument following thereon was immediately recorded.

At the meeting for election, Mr Macdowall objected to Mr Crawford's qualification, 1*ſt*, As being contrary to the act 10th Ann. requiring the right of the freeholder to be complete twelve months before the election, 7th March 1781, Ruſſell *contra* Ferguſſon; and, 2*dly*, Becauſe the eſtate having been clearly *reſerved* in Mr Crawford, for the purpoſe of giving him a right of voting, was thus in defraud of the ſtatutes relative to elections, particularly that of 7th Geo. II.

This objection, which was over-ruled by the freeholders, having been repeated in the Court of Seſſion, in conſequence of a complaint in the name of Mr Macdowall,

"The Lords repelled the objection, and diſmiſſed the complaint."

Act. *Blair*, et alii. Alt. *Wight*, et alii. Clerk, *Robertſon*.

C.

N° CCCXXI.

N° CCCXXI. *February* 20. 1787.

WILLIAM MACDOWALL,

AGAINST

THOMAS BUCHANAN.

MEMBER OF PARLIAMENT.—*Proof of the* old extent.

MR THOMAS BUCHANAN's claim to be inrolled as a freeholder in the county of Renfrew, was partly founded on the ſuperiority of the lands of Blackburn, which were ſaid to be a twenty-ſix ſhilling eight-penny land of old extent.

In evidence of this, a retour was produced, in which it was ſtated, That the deceaſed Robert Sempill died laſt veſt and ſeiſed *in tota et integra dimidietate viginti ſex ſolidatarum et octo denariatarum terrarum antiqui extentus de Blackburn, extenden. ad tredecim ſolidatarum et quatuor denariatarum terrarum ejuſdem.* And it was certified in the *valent* clauſe, *Quod prædicta æqualis dimidietas prædictæ viginti ſex ſolidatarum et octo denariatarum terrarum de Blackburn, cum pertinent. valet nunc per annum tribus libris ſex ſolidis et octo denariis uſualis monetæ hujus regni Scotiæ, et tempore pacis voluit tredecim ſolidis et quatuor denariis monetæ prædictæ.*

It was objected to this retour, That though it ſufficiently proved one half of the lands to have been valued at 13s. 4d. it did not thence appear, that the other half was preciſely of the ſame value.

" The Lords ſuſtained the objection."

Act. *Lord Advocate*, et alii. Alt. *Maclaurin*, et alii. Clerk, *Robertſon.*

C.

N° CCCXXII. *February* 20. 1787.

JOHN CAMPBELL, and others,

AGAINST

JOHN MACDOWALL.

MEMBER OF PARLIAMENT.—*Proof of the* valued rent.

THE meeting of commiſſioners of ſupply that aſcertained the valued rent of Mr Macdowall's lands, in virtue of which he was inrolled as a freeholder in the county of Renfrew, had been held in

conſequence of an adjournment made at a previous meeting, where, of *five* commiſſioners preſent, only *one* had taken the oaths to government.

A complaint having been, on this ground, preferred by John Campbell and others, freeholders in the county, againſt this inrolment, Mr Macdowall

Pleaded: By the annual ſtatutes reſpecting the land-tax, or ſupply, a failure on the part of the commiſſioners to take the oaths to government has not been made an eſſential objection to their proceedings. It only ſubjects them to certain pecuniary penalties. Nor would ſuch an objection, although founded on the ſtatutes, be fatal to the valuation of the reſpondent's lands. As no preciſe number of commiſſioners is required to conſtitute a meeting, a decreet pronounced even by *one* commiſſioner duly qualified muſt, if intrinſically juſt, be quite unexceptionable.

Anſwered: As the commiſſioners of ſupply are required, before any proceedings are held, to take the oaths to government, this muſt be conſidered as a condition annexed to their appointment; otherwiſe, indeed, diſaffected perſons might intrude into this office. So accordingly it was expreſsly found, 8th February 1751, Sutherland of Swinzie *contra* Sutherland of Langwell.

The other branch of the argument uſed in ſupport of the proceedings in queſtion, ſeems to be equally ill founded. The ſtatutes make mention of a *majority* of the commiſſioners, which evidently implies that the attendance of more than one commiſſioner is neceſſary; and the practice of requiring the preſence of *five* commiſſioners, in thoſe inſtances in which the Court of Seſſion has interpoſed to authoriſe a meeting, ſhews in the cleareſt manner the opinion entertained on this head. Earl of Panmure and others *contra* the Commiſſioners of Supply in the county of Forfar, 15th November 1766; Duke of Gordon *contra* the Commiſſioners of Supply of Banff, 13th December 1772; Brown *contra* Hamilton, 6th December 1780.

The Lords were unanimouſly of opinion, That the commiſſioners neglecting to take the oaths, was not a nullity in the proceedings; and that the caſe of Sutherland, in 1751, was erroneouſly decided. They alſo ſeemed to think that the preſence of *five* commiſſioners was not neceſſary, no ſuch number having been ſpecified in the ſtatutes. It was farther obſerved, that as the decreet of diviſion under challenge had been pronounced at a meeting of commiſſioners duly qualified, the circumſtance of its being held in purſuance of an adjournment, directed by a meeting at which the legal number of commiſſioners was not preſent, could not afford a relevant objection.

As, however, poſterior to the decreet in queſtion, an act of indemnity had paſſed, by which the proceedings of perſons acting in offices

fices of public truſt, without taking the required oaths, had been ratified, it was unneceſſary to determine the caſe on any of the grounds which had been inſiſted on by the parties.

"The Lords diſmiſſed the complaint."

Act. *Honyman*, et alii. Alt. *Wight*, et alii. Clerk, *Robertſon*.

C.

N° CCCXXIII. *February* 20. 1787.

WILLIAM CUNNINGHAM,

AGAINST

Sir WILLIAM MAXWELL, Baronet.

MEMBER OF PARLIAMENT.—Valued rent. *Subdiviſion of the valued rent of a barony, made in oppoſition to the old valuation-roll of the county, inept.*

BY the general valuation of the lands in the county of Renfrew, made up in 1654, and tranſmitted in 1709 to the Court of Exchequer, the lands of Bootſton, part of the old eſtate of Craigends, were ſeparately valued at L. 25 Scots.

In the year 1781, the valuation of a part of this eſtate, including the lands of Bootſton, was ſubdivided by the commiſſioners of ſupply, when, inſtead of adhering to the value formerly put on this parcel, they rated it at L. 34.

William Cunningham having appealed to this decreet of diviſion for aſcertaining the valued rent of the lands in virtue of which he claimed to be inrolled as a freeholder, the freeholders refuſed to admit him.

After adviſing a petition and complaint for Mr Cunningham, with anſwers for Sir William Maxwell,

"The Lords diſmiſſed the complaint."

Act. *Geo. Ferguſſon*, et alii. Alt. *Wight*, et alii. Clerk, *Robertſon*.

C.

N° CCCXXIV.

N° CCCXXIV. *February* 23. 1787.

JAMES MILN,

AGAINST

DAVID MITCHELL.

TACK.—*A tenant not intitled to ſet up an alehouſe on his farm.*

MR MILN, the proprietor of a barony, his charter containing in the *Tenendas* the common clauſe *cum breueriis*, brought an action in that character, before the judge-ordinary, againſt Mitchell, one of the tenants of the barony, who had ſet up an alehouſe on his farm, for "prohibiting him either to brew or ſell ale or ſpirituous li-"quors on any part of the lands."

Decreet having been given in terms of the libel, a bill of advocation was preſented. The Lord Ordinary "refuſed the bill;" upon which Mitchell reclaimed to the Court.

The Court, without ſeeming to pay attention to the purſuer's claims as a baron, were of opinion, That the tenant was here attempting to make ſuch an uſe of the property let to him as was not warranted by his tack, and ſuch as in itſelf ought to be diſcouraged.

They therefore refuſed the petition, which had been appointed to be anſwered.

Act. *Dean of Faculty.* Alt. *Ja. Clerk.* Clerk, *Orme.*

S.

N° CCCXXV.

N° CCCXXV. *February* 26. 1787.

WILSON and CORSE,

AGAINST

JOHN KAY.

PROOF.—*Parole proof not relevant againſt a bill of lading unretired.*

WILSON and CORSE ſhipped on board a veſſel at Leith, of which Kay was maſter, bound for Newcaſtle, a number of empty pipes and hogſheads, the bill of lading bearing, "That the caſks were to be delivered at the laſt mentioned port, to Green and Company."

Green and Company, however, denied that they ever received thoſe caſks, or had any notice of their arrival; upon which Wilſon and Corſe brought, before the magiſtrates of Edinburgh, as admirals-depute, an action againſt Kay for the value. The magiſtrates allowed to Kay a proof of delivery; but afterwards decerned againſt him. He then removed the cauſe into Court by ſuſpenſion; and the Lord Ordinary allowed a farther proof by witneſſes. Kay admitted that he had not got up the bill of lading, nor obtained any ſeparate written receipt for the goods, but inſiſted on eſtabliſhing the actual delivery by the parole proof.

The queſtion being brought under review by reclaiming petition, and anſwers,

The Court were of opinion, That parole proof could not be admitted to counteract the unretired bill of lading; and found Kay liable.

Lord Ordinary, *Alva.* Act. *Cullen.* Alt. *W. Craig.* Clerk, *Home.*

S.

N° CCCXXVI. *February* 27. 1787.

MARY ROLLO,

AGAINST

JAMES REID.

WRIT.—*Miſſive letters muſt be ſtamped in virtue of the act* 23*d Geo.* III. *c.* 58.

THESE parties having ſubſcribed mutual miſſives reſpecting the ſale of a houſe, Reid endeavoured to avail himſelf of the writings not being ſtamped, as a legal objection to the validity of the agreement.

Mary Rollo, therefore, brought an action in the Court of Seſſion; in which ſhe

Pleaded: The ſtatutes preceding the 23d of his preſent Majeſty are only applicable to writings importing an immediate conveyance of land, or to "indentures, leaſes, bonds, or deeds;" and ſo cannot be underſtood to extend to documents of a leſs formal nature than thoſe of which particular mention is made. In practice, accordingly, no ſtamp-duty has been hitherto required with regard to miſſive letters, and other writings of the ſame ſort.

It is true, that the ſtatute 23d of his preſent Majeſty is ſomewhat more comprehenſive, extending "to all agreements, whether they "ſhall only be the *evidence* of the contract, or *obligatory* on the par-"ties as a *written inſtrument.*" But even under this deſcription miſ-"ſive letters cannot be thought to be included. Taken by themſelves, they are not *obligatory*, each ſeparate miſſive being of the nature of an *offer*, which may be afterwards departed from; and as little can they be viewed as the *evidence* of an agreement concerning lands. Theſe muſt be transferred by writings of a quite different form, and for which a ſeparate ſtamp-duty muſt be paid.

Anſwered: It was to prevent an evaſion of the ſtamp-duties, by the uſe of miſſive letters, inſtead of more formal writings, that the ſtatute of Geo. III. was chiefly intended. And it is of no conſequence, that the deeds to be afterwards executed, in order to the complete fulfilment of the bargain, muſt alſo be ſtamped. The ſame thing occurs with regard to minutes of ſale, and many other writings, which, tho' not importing the immediate conſtitution of any right, muſt nevertheleſs be executed on ſtamped paper.

The

The Lord Ordinary ſuſtained the defences; and his judgment, after adviſing a reclaiming petition and anſwers, was affirmed by the Court.

The miſſives having been afterwards ſtamped, it was argued for the defender, that as this had not been done within three weeks after the execution of the writings, it could not validate the agreement, the ſtatute having provided, "That no memorandum or agreement ſhould "be deemed to be void, in caſe the ſame were ſtamped at the head "office, or the ſaid duty ſhall be paid thereon, and a receipt given for "the ſame by the proper officer, twenty-one days after the ſame has "been entered into."

This plea was, however, unanimouſly over-ruled; the purpoſe of the clauſe above recited evidently being, to enable the parties at any time within the period ſpecified in the ſtatute, to get the deeds ſtamped, without being liable in any penalty.

"The Lords found the defender obliged to fulfil the bargain."

Lord Ordinary, *Hailes.* Act. *Wight.* Alt. *Geo. Wallace.* Clerk, *Menzies.*

C.

N° CCCXXVII. *March* 6. 1787.

ELISABETH BUCHANAN, and JAMES HAMILTON, her Truſtee,

AGAINST

ARCHIBALD SPEIRS and PETER BOGLE.

MUTUAL CONTRACT.—*Privileges of a wife with regard to ſums aſſigned by her in her marriage-contract, in a queſtion with her huſband's creditors.*

BY a ſettlement executed by the father of Eliſabeth Buchanan, a conſiderable ſum of money was conveyed to a truſtee, to be life-rented by his widow, and to be divided, at her death, among ſuch of the children as were then alive.

Eliſabeth Buchanan, in her marriage-articles, aſſigned to her huſband, by way of tocher, "all her title and intereſt under her father's "ſettlement;" while he, on the other hand, became bound "to lay "out the tocher, and ſo much more as would amount to L. 4000, in "favour

" favour of the children of the marriage, and likewiſe for ſecuring " to Eliſabeth Buchanan, in caſe of her ſurviving him, an annuity of " L. 160."

Afterwards a part of the liferented funds was lent out to the huſband of Eliſabeth Buchanan, Archibald Speirs, and Robert Bogle, on their granting a bond payable to the truſtee. This money was wholly applied to the huſband's uſe; and after the death of the liferentreſs, the ſums due by the bond above mentioned having fallen to the ſhare of Eliſabeth Buchanan, and her huſband having become inſolvent, an action was inſtituted by her, and James Hamilton, her truſtee, againſt the co-obligants, who were at the ſame time creditors to the huſband to a great amount.

Pleaded in defence: If the ſums in queſtion had continued in the poſſeſſion of the truſtee, or had been lent out by him to a ſtranger, it may be admitted, that neither the huſband of Eliſabeth Buchanan, nor his creditors, could have inſiſted for payment, while the obligations he had come under to her remained unfulfilled. But theſe ſums have long ago been placed in the hands of the huſband himſelf; and to authoriſe a wife, in a queſtion eſpecially with her huſband's creditors, to *recover* money already intromitted with by him, would be to convert what is on her part merely a *perſonal* claim, into a *real* or *hypothecary* right. Nor can the circumſtance of the bond granted by the huſband and his cautioners have any influence on the right of the wife. This was at the time a proper meaſure; becauſe, while the liferentreſs ſurvived, it was uncertain to whom the money might ultimately belong. But after her death, the *right* having been united with the *poſſeſſion*, in the perſon of the huſband, every ſuch claim as the preſent muſt be excluded.

Anſwered: It is now a fixed point, That a wife, in ſecurity of the conditions ſtipulated in her marriage-contract, may not only *retain* ſuch of the ſums aſſigned in name of tocher as her huſband has not uplifted, but that, when he has become inſolvent, ſhe may *prevent* his creditors from attaching them while in the hands of a third party; 20th January 1781, Partners of the Woollen Manufactory at Haddington *contra* Eliſabeth Gray.

There is no ſolid ground of diſtinction between the preſent caſe and the one juſt now quoted. The huſband having granted the bond, is truly in the ſame ſituation as any ſtranger to whom the money might have been lent. And although, if he had been in affluence, the truſtee would not have been allowed to demand payment from him or his cautioners, for the purpoſe merely of being able again to ſurrender the money to him, it is evident, that, in the circumſtances which exiſt, ſuch a meaſure is not only juſtifiable, but abſolutely neceſſary.

" The Lords found the defenders liable in payment of the ſums " ſued for."

To

And they adhered to this judgment, after adviſing a reclaiming petition, and anſwers.

By a ſubſequent interlocutor, the principle of which did not differ from that of thoſe formerly pronounced, the Lords found the defenders entitled to retain, on giving ſecurity to the extent of the ſums ſued for, for payment of Mrs Buchanan's annuity, when it ſhould become due.

A petition was afterwards preferred by Eliſabeth Buchanan and her truſtee; in which it was urged, That the defenders ſhould be obliged to give ſecurity in general for the ſums which might become due to her in virtue of the marriage-contract. But the petition was refuſed.

Lord Ordinary, *Braxfield.* Act. *Wight, C. Hay.* Alt. *Lord Advocate, Solicitor-General.* Clerk, *Home.*

C.

N° CCCXXVIII. *March* 7. 1787.

CHARLES MAXWELL,

AGAINST

JAMES MONTGOMERY.

JURISDICTION.—*An action of damages on the head of adultery can be inſtituted by a huſband againſt the adulterer, without a proceſs of divorce being brought againſt the wife.*

MAXWELL, without bringing a proceſs of divorce, having inſtituted againſt Montgomery an action of damages, on account of the latter's having corrupted the wife of the former,

The defender *pleaded: In hoc ſtatu*, the action is not competent. By the Roman law, during its better periods, and downward to the innovations of Juſtinian, no huſband, while acquieſcing in his married ſtate, by declining a divorce, could bring any action on the ground of his wife's adultery, either againſt herſelf, or againſt the adulterer. To that enlightened people ſuch a conduct ſeemed to betray the purpoſe of committing *lenocinium*, *l.* 11. § 10. *l.* 29. *ff. Ad leg. Jul. De Adult.*; *l.* 11. *Cod. eod. tit.* Neither is there to be found any inſtance in which our law has given its ſanction to the contrary doctrine.

Anſwered:

Anſwered: There is no injury ſurely which affords a better title for an action of damages than that in queſtion. And there are obvious ſituations in which it would not be for the intereſt of the injured huſband, or of his family, to inſtitute a proceſs of divorce. But it would be moſt unjuſt, that the huſband, on this account, ſhould be forfeited of ſo ſtrong a right of action. In England, ſuch actions of damages are perfectly well eſtabliſhed, without either ſeparation *a menſa et thoro*, or divorce. Blackſtone, b. 3. chap. 8.

The cauſe was reported by the Lord Ordinary; when

The Court found the action competent.

Reporter, *Lord Swinton.* Act. *Wight.* Alt. *C. Hay.* Clerk, *Home.*

S.

N° CCCXXIX. *March* 8. 1787.

WILLIAM MACILWRAITH,

AGAINST

ROBERT RAMSAY.

JURISDICTION.—Factor. *A factor appointed by the Court of Seſſion, in virtue of the act* 1772, *c.* 72. *found liable in the penalties, after the ſtatute itſelf had been allowed to expire.*

IN 1779, Ramſay was apppointed factor by the Court of Seſſion on an eſtate ſequeſtrated in terms of the act of 1772. He neither lodged his accounts, nor made the dividends agreeably to the directions of the law.

In 1784, after the above mentioned ſtatute had been allowed to expire, Macilwraith, a creditor of the perſon whoſe effects had been ſequeſtrated, complained, in a ſummary manner, of theſe proceedings, to the Court; inſiſting not only for redreſs of the wrong that had been committed, but alſo for an inflict̃ion of the ſtatutory penalties.

A doubt having ariſen, how far theſe penalties could now be ſued for, the complainer

Pleaded:

Pleaded: The parity of diſtribution directed by the act 1772 was indeed the creature of poſitive law; but the authority of the Court of Seſſion to name factors, and to take cogniſance of their proceedings in a ſummary way, is an inherent part of their juriſdiction. A power of puniſhing the factors appointed by them, by impoſing adequate pecuniary fines, is of the ſame nature. Every judge muſt in this manner be enabled to enforce obedience to his lawful commands. Indeed any difficulty that could ariſe ſeems to be removed in the preſent caſe, by the poſterior act in 1782, which provides, that the rights of creditors under "the preceding bankrupt-ſtatute ſhall remain entire."

Anſwered: The power of impoſing diſcretionary fines on the ſervants or officers of Court, according to the demerits of the offender, and that of pronouncing a decreet for a penalty preſcribed by a particular law, without any regard to the alleviating circumſtances of the caſe, are in their nature totally different from each other. The one is implied in the conſtitution of every court; the other, reſulting only from poſitive enactment, muſt of courſe ceaſe along with the law from which it originated. In the Court of Exchequer, accordingly, where, from the great fluctuation of the ſtatutes relating to the revenue, this queſtion might have been often agitated, no example can be given in which action was ſuſtained for penalties incurred during the ſubſiſtence of a law which has been repealed, or which, being of a limited endurance, has been allowed to expire. And it is of no importance, that by a particular clauſe in the act of the 23d of his preſent Majeſty, the rights acquired by creditors under the enactment of 1772 have been preſerved. Without this proviſion, every one would have been at liberty, after the expiration of the firſt ſtatute, to attach the ſequeſtrated effects of his debtor, as if no ſuch proceedings had been held. But a penalty not inſiſted for during the continuance of the act 1772 cannot be thought to fall under this exception. It might with equal propriety be maintained, that, in conſequence of a bankruptcy occurring before the act was allowed to expire, creditors might now apply for a ſequeſtration; or that, if a petition had been preferred for that purpoſe on the day the ſtatute ceaſed to be in force, it would have been competent afterwards to proceed to the nomination of a factor, with the ſtatutory powers.

By one interlocutor, the Lords diſmiſſed the complaint as incompetent. But after adviſing a reclaiming petition for the complainer, with anſwers in behalf of Robert Ramſay, they altered that judgment, and

"Found the reſpondent liable in a penalty of L. 15 Sterling."

Reporter, *Lord Henderland.* Act. *Geo. Ferguſſon.* Act. *Dean of Faculty, Corbet.*
Clerk, *Home.*

C.

N° CCCXXX.

N° CCCXXX. *March* 8. 1787.

WILLIAM HUMPHRY,

AGAINST

HUGH CRAWFURD.

BANKRUPT ACT. 23d Geo. III. c. 18.—*Penalty on creditors who neglect to make oath on the* verity *of their debts within the* nine *months.*

WILLIAM HUMPHRY was creditor to a merchant whoſe effects were ſequeſtrated under the act 23d of his preſent Majeſty. Before the *nine* months had elapſed, he lodged his claim with Hugh Crawfurd, the factor; and he made oath as to the juſtice of it a very few days after that period, and before the ſcheme of diviſion had been finally ſettled.

Being refuſed a ſhare of the *firſt* dividend, which comprehended the whole funds belonging to the bankrupt, Humphry complained to the Court of Seſſion; and

Pleaded: The penalty which has been impoſed by the ſtatute on thoſe who are negligent in producing or authenticating their grounds of debt, is not a total forfeiture of their right, but merely a delay in payment; the creditors thus dilatory being entitled, with an abatement only of 5 per cent. to draw out of the ſecond dividend the ſame proportion of the ſums owing to them, as if their proceedings had been perfectly regular. When, therefore, there is to be no ſecond diſtribution, the whole funds having been collected before the firſt could be made, this proviſion of the ſtatute muſt be underſtood to ceaſe.

Nor, at any rate, could it be thought applicable to caſes like the preſent, where a claim, though perhaps not preciſely in terms of the ſtatute, has yet been exhibited in ſuch a manner as does not in the ſmalleſt degree ſtand in the way of that ſpeedy diviſion of the funds which the Legiſlature had in view. The ſame equitable practice ought here to be obſerved as in judicial ſales of landed eſtates, where, even though a decreet of certification has been pronounced, creditors who have neglected to appear are ſtill allowed to do ſo, at any time before the ſcheme of diviſion has been completely aſcertained.

Anſwered: It is true, that a creditor who has not regularly proved his debt prior to the expiration of the *nine* months, may, notwithſtanding, receive in the after diſtribution almoſt the ſame proportion of

of the ſums due to him, as if he had originally complied, in all reſpects, with the injunctions of the law. But from this it will not follow, that the compulſory regulation is of no force where no ſecond diſtribution can be made. The purpoſe of the law would in this manner be entirely fruſtrated in thoſe inſtances in which ſuch precautions are moſt neceſſary. The argument drawn from the modern practice in judicial ſales is equally ill founded. A factor named in purſuance of this ſtatute muſt implicitly follow the rules it has preſcribed. To authoriſe the ſmalleſt deviation, would be attended with the worſt conſequences.

It was ſeparately urged for the complainer, That at leaſt a ſhare of the funds correſponding to his debt ſhould have been ſet aſide, agreeably to ſect. 32. of the ſtatute, till the iſſue of the litigation was known. But to this it was anſwered, That the above mentioned clauſe did not relate to claims which had been irregularly made, but to thoſe only the juſtice of which required the diſcuſſion of courts of law.

"The Lords diſmiſſed the complaint, and found expences due."

Act. *Cullen.* Alt. *M'Cormick.* Clerk, *Sinclair.*

C.

N° CCCXXXI. *March* 8. 1787.

JAMES MORISON and COMPANY,

AGAINST

WILLIAM ALLARDES.

LITIGIOUS.—*Land-rights not rendered* litigious *by the mere execution of a ſummons.*

JAMES MORISON, Andrew Muriſon, and William Boggie, entered into a copartnery for carrying on a manufactory; and with that view purchaſed a houſe and a ſmall piece of land. The diſpoſition from the ſeller was conceived in favour of all the three *nominatim*, "equally amongſt them, their heirs and aſſignees, heritably and irre-"deemably."

Soon afterwards Boggie, one of the partners, borrowed a ſum of money from Allardes, to whom he granted an heritable ſecurity over the above mentioned ſubjects. But ſome days before this a ſummons,

in the name of the other partners, was executed againſt him, concluding for having it found, That the ſubjects, having been purchaſed for the company, could not be alienated or charged with debt by any of the partners till the company-debts were paid.

An action was afterwards inſtituted by the partners, for ſetting aſide the infeftment granted to Allardes, on this ground chiefly, That by the execution of the ſummons againſt Boggie, the ſubjects had become *litigious*, and of courſe incapable of alienation.——The defender

Pleaded: The rule, that *pendente lite nihil innovandum*, though of conſiderable importance to the efficacy of judicial proceedings, muſt always be ſo limited in practice, as not to encroach on the ſecurity of *bona fide* purchaſers and creditors. Hence, by the Roman law, from which the maxim has been introduced into Scotland, the *vocatio in jus*, which was of the nature of our ſummons, was not held to create *litigioſity*, this being only inferred from the litis-conteſtation, whereby the parties joined iſſue on the matters in controverſy, and the diſpute became ſo public as to put third parties on their guard. In the ſame way with us, ſo ſtrong an effect has never been given to the mere execution of a ſummons; but the cauſe muſt have been called in Court, or ſome litigation muſt have enſued, from whence the diſpute may be ſuppoſed to be generally known. Voet, *ad l.* 44. *tit.* 6. *ff. l.* 1. *ff. De* Litigioſis. Bankton, book 4. tit. 23. § 14. 9th January 1760, Menzies *contra* the Creditors of Gilleſpie.

Indeed it may admit of doubt, whether, ſince the eſtabliſhment of the public regiſters, the doctrine of litigioſity ought, with regard to land-rights, to be of any force. It is eaſy to ſee how little benefit would be derived from that inſtitution, if, on account of judicial proceedings which do not enter any proper record for publication, and ſtill more, if, by the mere execution of a ſummons, the work perhaps of a mean and needy meſſenger, tranſactions of the greateſt importance were liable to be ſet aſide. When to this it is added, that in queſtions of this nature every litigant, by uſing inhibition, may immediately notify his claim to the public in general, as well as to the perſon againſt whom his action is directed, it muſt appear moſt juſt, that any loſs ariſing from his neglecting to uſe this precaution ſhould be made to fall on himſelf. And it is of no importance, that in the caſe of an inhibition the intimation to the debtor, if duly followed with regiſtration, and in adjudications the execution of the ſummons, are ſufficient to bar a poſterior alienation. Neither of theſe can be viewed as an *action*, but as a form of *legal diligence*, to which, by enactments in 1621 and 1672, when the utility of the records was not fully underſtood, extraordinary privileges were annexed. And even although they could with propriety be mentioned as exceptions from the general rule, this ſurely ought not to pave the way for any farther deviation.

Anſwered: If the prohibition ariſing from litigioſity is to be of any uſe, it muſt have its commencement from the time at which the claim

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is firſt notified to him againſt whom the action is brought. To allow of any interval, would only haſten thoſe fraudulent alienations which it was intended entirely to repreſs.

In the uſage of ancient Rome, litigioſity was not eſtabliſhed by the *vocatio in jus*; becauſe, from the manner in which this was at firſt performed, it conveyed no intimation of any particular claim. But when a more decent method of ſummoning was introduced by Juſtinian, the defender being furniſhed with a ſchedule, containing the grounds of the action, this was immediately altered. The practice of Scotland, confeſſedly derived from this ſource, has continued to run in the ſame channel: and hence a ſummons once marked by the clerk, or called in Court, though ſuch proceedings are of no greater notoriety than the execution of the ſummons, has been found to prevent alienation. Hieneccius, *ad tit. ff. de in jus vocando, Authentic. litigioſa.* Gudelinus *de jure noviſſimo.* Dictionary, *voc.* Litigious, 9th January 1760, Menzies *contra* the Creditors of Greenhill.

Neither has the eſtabliſhment of the records produced any alteration in this part of our law. In no caſe do the ſtatutes provide a remedy for a defect in the right of the perſon from whom a conveyance is obtained; the ſole purpoſe of the Legiſlature being to enact, that in a competition of rights of the ſame nature, and acquired from the ſame perſon, ſuch deeds as have been regiſtered ſhould, without regard to priority of date, be preferred to thoſe unregiſtered. And with reſpect to judicial proceedings, the only proviſions that have been made in 1669, c. 10. and 1696, c. 19. relative to the interruption of preſcription in real rights, being grounded on the idea, that all ſummonſes were at common law effectual even againſt third parties from the date of their execution, tend in the ſtrongeſt manner to enforce the preſent argument. The effect, too, which is ſtill given to an inhibition, after it is perſonally intimated to the debtor, and to the execution of the ſummons in proceſſes of adjudication, cannot be accounted for in the way ſuggeſted on the other ſide. The ſtatute of 1621, it is true, ſet aſide alienations in favour of a creditor after the commencement of legal diligence at the ſuit of another creditor; but the ſame thing is obſerved with regard to a purchaſer, a caſe neither within the words, nor in the purview of that enactment. And beſides the adjudications introduced by the ſtatute 1672 inſtead of appriſings, there were others formerly known, which have been always attended with the ſame conſequences. As to the ſuppoſed neglect of the purſuers, in not uſing an inhibition, the obſervation ſeems entirely groundleſs. For, not to mention that this form of diligence is not properly applicable to declaratory actions, ſuch as the one giving riſe to the preſent diſpute, it is evident, that in this way the doctrine of litigioſity might, with regard to land-rights, be altogether laid aſide.

"The Lord Ordinary ſuſtained the defences."

After adviſing a reclaiming petition, with anſwers, the Court altered the judgment of the Lord Ordinary.

A petition was afterwards preferred for the defender, which was followed with anſwers.

The Lords ordered a hearing on the general point; after which they altered their interlocutor; thus returning to the judgment pronounced by the Lord Ordinary.

A reclaiming petition was preferred for the purſuers; which was refuſed.

Lord Ordinary, *Hailes.* Act. *Lord Advocate, C. Hay, Maconochie.* Alt. *Blair.*
Geo. Ferguſſon, W. M. Bannatyne. Clerk, *Robertſon.*

C.

N° CCCXXXII. *March* 9. 1787.

WILLIAM JARDINE,

AGAINST

BARBARA DE LA MOTTE.

ADULTERY.—*To what effect recrimination pleadable in the action of divorce.*

IN an action of divorce, at the inſtance of Mr Jardine againſt his wife, the latter reſorted to the defence of recrimination; and the Commiſſaries allowed a proof, before anſwer, of that plea.

Againſt that interlocutor the purſuer preſented a bill of advocation, in which he prayed, That the cauſe might "be remitted, with an in-"ſtruction to the Commiſſaries, either to repel the defence of recri-"mination altogether, or at leaſt to find, That it was not admiſſible "by way of exception."

The Lord Ordinary, in reſpect the interlocutor of the Commiſſaries was before anſwer, refuſed the bill; but remitted the cauſe to them, with this inſtruction, That they allow the defender to repeat her counter proceſs of recrimination in this proceſs.

This judgment was by both parties underſtood to imply, that the plea of recrimination could not be received in bar of the action; but, on the contrary, that it could only be conſidered as a foundation for

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a reciprocal decree of divorce; a conſequence which the defender choſe to decline. The defender therefore reclaimed; and

Pleaded: Conjugal infidelity does not of itſelf annul marriage. It is no more than the ground on which the injured party may claim divorce; Erſkine, b. 1. tit. 6. § 43. But a perſon againſt whom the accuſation is reciprocal is not intitled to the name or the rights of the *injured party.* "Viro atque uxore," ſays Papinian, "mores invicem "accuſantibus, *cauſam repudii dediſſe utrumque* pronunciatum eſt: Id "ita accipi debet, ut ea lege, quam ambo contempſerunt, neuter vin-"dicetur: paria enim delicta mutua *penſatione* diſſolvuntur;" *l.* 39. *ff. Solut. matrim.* This recrimination, therefore, is, in the words of Lord Bankton, "a good defence againſt divorce for adultery;" b. 1. tit. 5. § 128.

Anſwered: The effect of the defence of recrimination has never yet been preciſely determined. But the uniform practice of the Commiſſary-court, in refuſing to ſuſtain that plea as competent, except in the way of counter proceſs, ſeems to indicate that it cannot be urged in bar of action, and that its only operation is with reſpect to pecuniary conſequences. Such, for example, was their proceeding in the noted caſe of Campbell of Elderline in 1726. Indeed it appears inconſiſtent, that the adultery of one of the parties ſhould be a ſufficient foundation for divorce, while that of both ſhould ſecure the continuance of the matrimonial connection. The authority of the Roman law has been miſapplied. At every period of that law, either of the parties might make a divorce at pleaſure, ſubmitting only to the *pœna diſcidii,* which was the loſs of part of the *dos,* or *donatio propter nuptias.* Inſtead, therefore, of a plea in bar of divorce, the text quoted refers to one in bar of that pecuniary penalty. Vid. *Heinec. ad leg. Jul. et Pap. Popp.* The opinion of Lord Bankton ſeems to have been occaſioned by the ſame miſapprehenſion of this text.

"The Lords remitted to the Lord Ordinary, to remit to the Com-"miſſaries, with an inſtruction to allow the defender to repeat a "counter proceſs of recrimination in the proceſs of divorce, and to "allow a proof before anſwer; but under this qualification, That ſta-"ting the defender's recrimination in the ſhape of a counter action "ſhould not prevent her from pleading the purſuer's guilt, when "proved, as a total bar to his obtaining a decree of divorce, nor him "from pleading his anſwers thereto."

Lord Ordinary, *Juſtice-Clerk.* Act. *Maclaurin.* Alt. *Dean of Faculty.*

S.

N° CCCXXXIII. *June* 13. 1787.

JOHN ANDERSON,

AGAINST

WILLIAM RICHARDSON.

DELINQUENCY.—*Expreſſions injurious to a third party, uttered by a profeſſor in a private diſcourſe with a few of his ſtudents, found to be actionable.*

MR ANDRESON, one of the profeſſors in the univerſity of Glaſgow, raiſed an action before the Commiſſary of the diſtrict, againſt Mr Richardſon, another profeſſor in the ſame univerſity, libelling, That the defender had, in private, harangued three of the ſtudents with falſe and injurious invectives againſt the purſuer's character; affirming, in particular, that the latter was "a bad man, and "a deteſtable member of ſociety."

The Commiſſary, "as it was not ſaid, or offered to be proved, that "any other perſons than the three ſtudents themſelves were preſent, "found, That it would be unbecoming, and of bad example, to call "ſtudents in that ſituation as witneſſes in a court of law, in order "to make them diſcover, upon oath, the preciſe terms or tenor of a "private admonition given to them by one of their profeſſors; and "therefore aſſolizied the defender."

The cauſe having been brought before the Court by advocation, it was

Pleaded for the defender: A profeſſor, in reſpect of his pupils, is like a father or a guardian. But ought the admonitions that are given under theſe relations, in the hours of retirement and confidence, to be made a foundation for actions of damages, ſuch as the preſent? Still more "unbecoming, and of worſe example," would it be, that the pupils ſhould be made to aſſume the treacherous character of witneſſes againſt their monitors. This action, therefore, whether conſidered in itſelf, or with reſpect to the mode of proof to which it refers, is equally incompetent. The charge, beſides, is not relevant. The expreſſions in queſtion are plainly ſuch as it may often be neceſſary to uſe for the purpoſe of admonition; and thus the ſuppoſition

poſition of an *animus injuriandi* is excluded, it not being alledged that the pretended ſlander was diſſeminated. Sir George Mackenzie's Criminals, tit. 30. § 2.; Erſkine, b. 4. tit. 4. § 80.; Blackſtone, b. 3. chap. 8. § 5.

Anſwered: If the *animus injuriandi* can be proved, action ſhould certainly be ſuſtained, though the injury has been done in the courſe of private admonition, whatever be the relation between him who admoniſhes and the perſon admoniſhed. The expreſſions libelled, to uſe the words of Voet, *ad tit. D. de injuriis, et fam. libel.* § 20. " Per ſe, et " propria ſignificatione contumeliam inferunt; hinc injuriandi animus " adfuiſſe creditur, eique qui illa protulit probatio incumbit, inju- " riæ faciendæ conſilium defuiſſe." Nor is it enough that the calumny was not diſſeminated. Diſſemination is not of the eſſence of defamation; for a perſon may be defamed, with as bad conſequence, to an individual, as to a multitude. If, therefore, the offence itſelf is actionable, the admiſſibility of the witneſſes mentioned muſt follow of courſe.

The Lord Ordinary reported the cauſe; when it was

Obſerved on the Bench: The doctrine of the defender is a dangerous one. Slander ought never to be allowed to paſs under the diſguiſe of private admonition.

" The Lords repelled the objections ſtated againſt the relevancy of " the libel."

Reporter, *Lord Eſkgrove.* Act. *Maclaurin, Roſs.* Alt. *Dean of Faculty, Craig. J. Millar jun.*

S.

N° CCCXXXIV.

N° CCCXXXIV. *June* 14. 1787.

JAMES MACADAM,

AGAINST

ALEXANDER MACWILLIAM.

BILL OF EXCHANGE.—*Regular negotiation not required of ſuch bills as are granted merely for the accommodation of the drawer.*

Bills paſs by indorſation as well after as before proteſt.

CERTAIN bills drawn by Macwilliam, and accepted, were indorſed to Macadam, after ſome intermediate indorſations, and after being proteſted. The acceptor having become bankrupt, the indorſee ſued the drawer for payment; who in defence

Pleaded: 1*ſt*, The bills after proteſt could not be transferred by indorſation; and, 2*dly*, They have not been negotiated according to thoſe rules which are eſtabliſhed for the preſerving of recourſe.

Anſwered: 1*ſt*, During the whole of the ſtatutory period, bills paſs from hand to hand as bags of money; and it ſeems abſurd to conceive, that their being proteſted ſhould deprive them of this privilege. 2*dly*, Regular negotiation is not to be required of bills that, for the ſole purpoſe of raiſing money to accommodate the drawer, have been accepted without value; ſuch, in ſhort, as are well known by the appellation of *Wind-bills*.

The Lord Ordinary reported the cauſe; and

The Lords repelled the above defences.

Reporter, *Lord Stonefield.* Act. *Roſs.* Alt. *Abercromby, Maconochie.* Clerk, *Home.*

S.

N° CCCXXXV.

N° CCCXXXV. *June* 22. 1787.

The MINISTER of the PARISH of TINGWALL,

AGAINST

The HERITORS.

KIRK.—*What proportion ought to be observed between the number of examinable persons in a parish, and the dimensions of the parish-church.*

THE Presbytery of Zetland having directed a new church of certain dimensions, to be built in the parish of Tingwall, the heritors brought those proceedings under the review of the Court of Session, by a bill of suspension.

The Lord Ordinary pronounced this interlocutor:

" Finds, That when it becomes necessary to build a new church, " the heritors of the parish are bound to provide one sufficient for " the accommodation of the parishioners capable of attending public " worship; and that this is a burden under which they acquired and " hold their estates: Finds it admitted, that the parish of Tingwall " does at present contain 209 families: Finds, That there are in it " 847 persons capable of attending divine worship: Finds, That the " church, as proposed by the heritors, is not of dimensions more than " sufficient to accommodate 426 persons; and that the church, as " proposed by the presbytery, is of dimensions sufficient to accom- " modate 585 persons: Finds, That a church of the former dimen- " sions would be too small, and that the latter would not be too large, " for the decent and convenient attending on divine worship in the " parish of Tingwall."

Against this judgment, the heritors preferred a reclaiming petition, in which they also insisted, that the *form* of the church proposed by the presbytery was liable to considerable objections. After advising this petition, with answers given in, in behalf of the minister,

The Court were in general of opinion, That the *plan* of the building might be concerted among the heritors themselves, without the intervention of the presbytery, whose only province it was, to see that the church was of a proper *size* for accommodating those who attended puplic worship.

The extent of the accommodation requisite for the number of pa-

riſhioners was fixed in this manner: Thoſe were deemed examinable perſons who were twelve years old; and the church was to be built in ſuch a way as to be capable of containing two thirds of the pariſhioners falling under this deſcription. This was laid down as a general rule to be obſerved in all time coming.

The Lords found, "That the heritors of the pariſh of Tingwall are "obliged to build a church capable of containing two thirds of the "examinable perſons in the pariſh, not under twelve years of age; "and remitted to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Henderland.* Act. *W. Robertſon.* Alt. *Cha. Hay.*
Clerk, *Home.*

C.

N° CCCXXXVI. *June* 27. 1787.

The PROCURATOR-FISCAL of the COUNTY of EDINBURGH,

AGAINST

DAVID WILSON.

PROOF.—*Delicts, how to be proved. Reference to oath.*

DAVID WILSON was ſued before the ſheriff of Edinburgh, by the procurator-fiſcal of the county, upon the act 1707, c. 13. whereby perſons ſhooting hares are ſubjected to a penalty of L. 20 Scots, *toties quoties*. The fact being offered to be proved by his oath, he

Pleaded: The tranſgreſſion of a prohibitory ſtatute, even when it is attended only with a pecuniary penalty, infers ſuch a degree of ignominy as muſt preclude the reference to the oath of party, agreeably to the rule, *Quod nemo tenetur jurare in ſuam turpitudinem;* 4th December 1762, Stirling *contra* Chryſtie. But the puniſhments annexed to the offence in queſtion are not merely of a pecuniary nature. The ſhooting of hares was in ancient times a point of dittay, and puniſhable with death. Even by the ſtatute of 1707, perſons guilty of any of the offences to which it relates, may be ſent abroad as recruits. To admit a reference to oath, in circumſtances ſuch as theſe, would be a great inlet to perjury.

Anſwered: Where the facts alleged againſt a defender are of ſuch

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a nature as to render him infamous, if proved, or where the proſecution has been brought in order to the infliction of a corporal puniſhment, it may be acknowledged, that by our cuſtoms, agreeably to the Civil law, a reference to oath has not been allowed. But this reſtriction is nowiſe applicable to an action like the preſent, inſtituted for the recovery of a very moderate fine. Without ſuch a mode of proof, indeed, many of the ſlighter offences which infeſt ſociety could not be brought to puniſhment. The deciſion referred to, which is quite contrary to the eſtabliſhed practice, as well as to many former precedents, appears from the records to have been erroneouſly collected. As the queſtion there turned on the ſtatute of 1698, whereby tenants are made liable for trees cut on their farms, unleſs they are able to fix the guilt on third parties, the point here in diſpute could not occur for determination. Dict. *voc.* Proof.

The defender ſeparately contended, That the ſtatute 1707 was in deſuetude. This argument, however, was entirely diſregarded.

The ſheriff-depute found, That the reference to oath was competent. A bill of advocation preferred for the defender was refuſed by the Ordinary on the bills.

The queſtion was afterwards conſidered by the Court, in a reclaiming petition and anſwers, in which the purſuer reſtricted his claim to one ſum of L. 20 Scots. One of the Judges expreſſed a doubt, whether ſuch a judicial tranſaction as is implied in a reference to oath could be validly entered into by a procurator-fiſcal.

" The Lords adhered to the judgments of the ſheriff and of the " Lord Ordinary."

Lord Ordinary, *Braxfield.* Act. *Solicitor-General.* Alt. *Dean of Faculty, Patiſon.* Clerk, *Menzies.*

C.

N° CCCXXXVII.

N° CCCXXXVII. *June* 28. 1787.

Sir WILLIAM ERSKINE,

AGAINST

ROBERT and HENRY DRUMMOND.

DECLINATOR.—*A judge may vote in the cauſe of his nephew by affinity.*

IN the action depending between theſe parties, the Lord Preſident ſuggeſted a doubt, how far he was at liberty to vote, on account of his connection with Mr Henry Drummond, who was married to his brother's daughter.

This declinator was unanimouſly repelled, and the determination was ordered to be marked in the books of ſederunt.

The ſtatute 1594. c. 212. prohibited judges from voting where their father, or brother, or ſon was a party. By act 1681, c. 13. this prohibition was extended to all relations in the firſt degree, whether by conſanguinity or affinity; and it was farther provided, "That no "judge ſhould ſit or vote in any cauſe where he is uncle or nephew "to the purſuer or defender." But as the latter part of the act did not, like the former, particularly exclude uncles or nephews by affinity, it had been found, That a judge might vote in the cauſe of one who was married to his niece, unleſs where the niece was the proper party and the huſband only called for his intereſt; 31ſt January 1712, Calder *contra* Ogilvie.

Nota, About the ſame period, Lord Alva refuſed to decide as an Ordinary, in a queſtion in which Mr Carruthers of Holmains was a party. This gentleman was his nephew by affinity; and his daughter was married to his Lordſhip's ſon. But the Court altered the judgment, and remitted the cauſe to the Lord Ordinary.

C.

N° CCCXXXVIII.

N° CCCXXXVIII. *July* 12. 1787.

JOHN HALL and the PROCURATOR-FISCAL of the SHERIFF-COURT of ROXBURGHSHIRE,

AGAINST

JOHN BILLERWELL.

PACTUM ILLICITUM.—*Combination againſt receiving money of a particular coinage, illegal.*

BILLERWELL, a ſhopkeeper, and other traders in the town of Jedburgh, entered into a combination, by which they agreed to refuſe the accepting of ſuch halfpence as were of the coinage of the preſent King. The reaſon aſſigned for this reſolution was, that there were then great numbers of counterfeits of that coin in circulation, which it was extremely difficult to diſtinguiſh from the genuine halfpence.

Hall having proffered to Billerwell, for ſome of the articles in his ſhop, ſeverel pieces, bearing the impreſſion of the halfpence of his preſent Majeſty, the latter rejected them with diſdain; upon which Hall, with the concurrence of the procurator-fiſcal, applied by petition to the ſheriff, complaining of the above mentioned combination, and of this incident, which was the conſequence of it; and praying, That Billerwell might be found liable in damages to him, and in a fine to the public.

The cauſe was brought under the review of the Court; when, after inſpection made, by the officers of his Majeſty's mint, of the halfpence in queſtion, and a report given by them, bearing, "That tho' they had good reaſon to believe the halfpence to be genuine coins, yet their appearance was not without ſuſpicion,"

The Lord Ordinary aſſoilzied the defender.

The purſuers having reclaimed againſt this interlocutor,

The Court "adhered to it, ſo far as reſpected Hall, the private "purſuer; but found the combination entered into by the reſpon-"dent, not to receive in payments the copper coin of his preſent "Majeſty, George III. was improper and illegal; therefore fined "and amerciated him in the ſum of L. 5 Sterling to the poor of the

" pariſh of Jedburgh; and farther found him liable in ſuch expences " as the procurator-fiſcal ſhould depone he laid out previous to the " date of this interlocutor."

Lord Ordinary, *Swinton.* Act. *G. Fergusſon.* Alt. *Maconochie.* Clerk, *Home.*

S.

N° CCCXXXIX. *July* 17. 1787.

SHEDDAN and COMPANY,

AGAINST

LOGAN, GILMOUR and COMPANY.

PERICULUM.—*Whether any ſhort preſcription obtains of action on policies of inſurance.*

Whether the onus probandi *of deviation lies on the inſurer or inſured.*

LOGAN, GILMOUR and Company, in 1775, made inſurance, at Norfolk in Virginia, on a ſhip belonging to Sheddan and Company, " from that port to the iſland of Tobago, with liberty to call " at two more iſlands while there, and from thence back to Nor- " folk."

In 1784, action was brought for the inſured values, before the High Court of Admiralty; the delay of that proceeding having probably been occaſioned by the war, and the confuſion that ſubſiſted in the intervening period. The proof adduced ſhowed, that the veſſel was captured by the enemy before its voyage was ended; but it did not aſcertain, whether ſhe had always continued in the preciſe courſe deſcribed in the policy. Neither ſentence of condemnation, nor proteſt by the ſhipmaſter, appeared to have taken place. The cauſe having been removed into the Court of Seſſion, it was

Pleaded for the defenders: It is incumbent on the inſured, not only to prove a loſs, but that it is preciſely ſuch an one as comes under the inſurance. He alone, indeed, poſſeſſes the means of proof, while the inſurer is in the ſituation of a ſtranger; Park's Syſtem, p. 464. It further behoves the inſured to intimate the loſs to the inſurer without delay, that while circumſtances are recent he may the better obtain

tain the requiſite information; Weſket *v.* Claim, Inſured, Notice. Accordingly, in every trading nation of Europe, if Britain alone be not an exception, a preſcription of this kind has been eſtabliſhed, which in none of them exceeds the period of four years. *Vid.* Foreign ordinances, *penes Magens.* And it would be ſtrange indeed, if, inſtead of four, our law were to admit no limitation ſhort of forty years. If, however, in this particular caſe, no preſcription ſhall operate, the delay of action, which excludes the defender from every proper inquiry, ſhould at leaſt enforce the demand from the purſuers of complete and ſatisfactory evidence. Yet the moſt eſſential piece of evidence is here a-wanting, there being nothing to ſhow that there happened no deviation in the courſe of the voyage inſured. Nor can any ſuppoſed ſtate of public affairs afford an excuſe for the non-production of ſuch documents as the ſhipmaſter's proteſt and the ſentence of condemnation.

Anſwered: Whatever rules may obtain in foreign ſtates, it is certain, that in Scotland no ſhort preſcription is known of claims on policies of inſurance; nor is there any ſpecial preſcription of them in England, where they are left to the operation of the general ſtatute of limitations. But in the preſent caſe, there could be no room for preſcription, as the only delay which has happened was occaſioned by the public calamities. That the capture in queſtion was prior to the completing of the voyage, is indiſputable; and if the defenders affirm that the voyage, as inſured, was deviated from, the proof of ſuch deviation muſt be incumbent on themſelves.

The Lord Ordinary pronounced this interlocutor: "In reſpect it "is neither proved, nor offered to be proved, that the ſhip was loſt "in a voyage different from that deſcribed in the policy, finds the "defenders liable for the inſured values."

A reclaiming petition having been preſented, to which anſwers were given in,

"The Lords adhered to the interlocutor of the Lord Ordinary;" as they again did, on adviſing a ſecond reclaiming petition and anſwers.

Lord Ordinary, *Braxfield.* Act. *Roſs.* Alt. *Rolland.* Clerk, *Home.*

S.

Nº CCCXL.

N° CCCXL. *July* 17. 1787.

THOMAS CADELL, and others,

AGAINST

WILLIAM ANDERSON and JOHN ROBERTSON.

DAMAGE and INTEREST.—Act 8th Anne. *The reverſionary intereſt of authors under the ſtatute, aſſignable*

The ſtatute extends to notes, variations, and corrections, introduced in new editions of a book.

THE late Sir William Blackſtone publiſhed his *Commentaries on the Laws of England*, conſiſting of four volumes, in ſo many different years; and he entered each volume, previouſly to its publication, in the regiſter of Stationers Hall. The copy-right of the whole book he afterwards ſold to Mr Cadell, and two other Engliſh bookſellers.

On the expiration of *fourteen* years after the publiſhing of the *firſt* volume, Sir William aſſigned to the ſame perſons his reverſionary intereſt in it for the ſecond ſtatutory term; but he died before *fourteen* years had elapſed from the publication of any of the other volumes.

In reviſing his work, he had made, throughout, a conſiderable number of corrections and alterations of the text, which he alſo conveyed to his aſſignees; and they employed another author, Dr Burn, to ſubjoin ſome annotations.

The aſſignees included all thoſe corrections and notes in a new edition, which they too entered at Stationers Hall. This new edition having been reprinted in Scotland, by Meſſrs Anderſon and Robertſon, the aſſignees ſued them in an action of declarator and damages, founded on the ſtatute 8th Q. Anne, cap. 19.

Pleaded for the defenders,—with reſpect to the *firſt* volume: The ſtatute enacts, "That the author of any book not then publiſhed, and "his *aſſignee or aſſigns*, ſhall have the ſole liberty of printing and re-"printing ſuch book for the term of *fourteen* years, to commence "from the day of the firſt publiſhing of the ſame, and no longer."

By a poſterior clauſe, indeed, it is "provided, That after the expi-"ration of the ſaid term of fourteen years, the ſole right of printing "or diſpoſing of copies ſhall *return to the authors* thereof, if they are "then living, for another term of fourteen years." But that reverſionary

ſinary right is perſonal to authors themſelves, whom it cannot ſurvive by being transferred to aſſignees. This appears from the contraſt of the two enactments; the former beſtowing the privilege, not only on authors, but their aſſigns alſo, while the latter ſpecially limits the return "of the right of ſelling or diſpoſing of copies" to the authors themſelve alone: for by *copies* are meant printed copies of any book, and not the copy-right. Thoſe profits which, under this reverſionary intereſt, accrue to authors during their own lives, may, no doubt, be aſſigned in the ſame manner as any other right of liferent; but farther than this the bounty of the Legiſlature has not been extended: and it might not have been extended ſo far. The aſſignment, then, of the firſt volume in queſtion, became void on the death of the author.

Nor can the purſuers derive any excluſive claim to the ſubſequent volumes, the property of which is acknowledged to be at an end, from thoſe corrections or alterations, or from thoſe trivial notes. At that rate, authors might, by the ſimple manœuvre of throwing in a few variations into every ſucceeding edition of their works, create to themſelves that very perpetual monopoly to which the law has denied its ſanction. For the public undoubtedly will ever prefer that edition of a book which it ſuppoſes to have received any new improvement, however minute.

Anſwered: The whole argument of the defenders reſpecting the *firſt* volume is founded on the ſuppoſition, that the word *copies* in the ſtatute ſignifies *individual printed copies*; a truly ſingular interpretation. The title of this act is, "An act for veſting the copies of printed "books in the authors or purchaſers of ſuch copies, during the times "therein mentioned." And is it not obvious, that the purchaſers here meant are not thoſe who buy in a bookſeller's ſhop, a printed copy of a book? In the ſame manner, throughout the whole of the ſtatute, it is perfectly clear, that by the term *copy* is expreſſed the copy-right, or the author's right in his own manuſcript. There is then no difficulty in the caſe. The right which returns after the expiration of the firſt term, that of printing and diſpoſing of copies, is preciſely the ſame which exiſted before, the ſole right of printing the original manuſcript, or of aſſigning that copy-right. Thus the ſtatute is reſcued from the imputation of inconſiſtency, which it was made to labour under.

With regard to the corrections, alterations, and notes, it ſeems abſurd to conceive, that the authors of theſe ſhould not have the ſame property in them as in any other fruits of their literary labour. See the caſes of Tonſon *verſus* Walker, in 1752, and Maſon *verſus* Murray, in 1777, decided in Chancery, in England. If thoſe variations or additions be trivial, the defenders might have omitted them without injury to the original work, which they could have republiſhed without challenge.

The Lord Ordinary reported the cauſe; when

The Court found, "That the purſuers, under the authority of the "ſtatute, had an excluſive right of publiſhing the work in queſtion."

Againſt this judgment a reclaiming petition was preferred; which, ſo far only as reſpected the firſt volume, was refuſed without anſwers. But with regard to the other three volumes, anſwers were appointed; and on again adviſing the petition, along with theſe,

The Lords pronounced this interlocutor: "Find, That the pur-"ſuers have the ſole right of printing and reprinting the firſt vo-"lume of Sir William Blackſtone's Commentaries, for and during the "ſecond term of fourteen years after the expiration of the firſt four-"teen years, ſecured to him and his aſſignees under the ſtatute of "Queen Anne: And find, That the purſuers alſo have the ſole right "of printing and reprinting the other three volumes of the ſaid "Commentaries, with the corrections and continuations, as entered "by them in Stationers Hall, for and during the term of fourteen "years after the date of ſuch entry; but remit to the Lord Ordi-"nary to hear parties procurators, how far, and to what extent, the "penalties of the act of Queen Anne may or can be applied to the "printing of theſe three volumes by the defenders, as now complain-"ed of in this action."

Reporter, *Lord Juſtice-Clerk.* Act. *Blair, Fraſer-Tytler, Steuart.* Alt. *Lord Advocate, Dean of Faculty, Hope.* Clerk, *Sinclair.*

S.

N° CCCXLI. *July* 17. 1787.

THOMAS PAYNE and THOMAS CADELL,

AGAINST

WILLIAM ANDERSON and JOHN ROBERTSON.

DAMAGE AND INTEREST. REPARATION—*No action on the ſtatute of 8th Queen Anne, cap.* 19. *except for the penalties.—Whether the* præſumtio juris et de jure *of* ignorance *eſtabliſhed by this ſtatute can be admitted in a caſe which of itſelf implies* knowledge.

MESS. Payne and Cadell purchaſed the copy-right of a novel, intitled *Cecilia;* but they neglected to enter the work in the regiſter of Stationers Hall, as the act 8th of Queen Anne directs.

Some

Some time after they had publiſhed this book, Meſſ. Anderſon and Robertſon reprinted it in Scotland, in an edition which exhibited the ſame title-page, ſo as to aſſume the names of the true editors; and by a ſtudied ſimiliarity of type and paper, and an exact imitation throughout in the printing of every letter, they formed an almoſt perfect copy of the original.

Meſſ. Payne and Cadell ſued thoſe perſons; 1. In an action of damages, and for penalties, on the ſtatute; and, 2. In an action of damages at common law, for having improperly aſſumed their names, and other circumſtances, by which they were diſtinguiſhed in their profeſſion.

Pleaded for the purſuers,—with reſpect to the action on the ſtatute: This act firſt confers on the authors of books "the ſole right and li- "berty of printing ſuch books" for a certain term. Thus a right of property is conſtituted; and although the ſtatute had proceeded no farther, the inherent power of vindicating the right would have been implied as a neceſſary conſequence. But it goes on to enact the forfeiture of the unlawful publication, together with penalties proportioned to the extent of the offence. Theſe two enactments are diſtinct in their object, and ſeparated in the language of the ſtatute. It is to the latter only that the condition of entry at Stationers Hall is annexed. Thus: "Nothing in this act ſhall extend to ſubject any "perſon to the *forfeitures or penalties* therein mentioned, unleſs the "titles of the books be entered in the regiſter book of the company "of ſtationers." Were there not ſtill an action for reparation of damage competent to authors, the ſtatute could hardly be ſaid to protect their property. The enactment of penalties in which any one of the people who ſhall give information of the offence obtains an intereſt, excluſive of theirs, was never intended for their indemnification, nor directly for their emolument in any degree, who are likely to be among the laſt to obtain ſuch information.

"From the whole tenor of the ſtatute, it is evident a right of property was intended to be conveyed, independently of entry. The clauſe, towards the concluſion, which declares, that all actions "for "any offence that ſhall be committed againſt this act ſhall be brought "within three months after the offence," affords the ſtrongeſt proof of this intention. By the words, "offence committed againſt this "act," is meant, offence againſt that right of property, thus defended by the penalties and forfeitures of the ſtatute; for which penalties and forfeitures all action is debarred, unleſs brought within three months from the commiſſion of the offence. But the ſtatute having once veſted and declared a right of property during a certain period, that right is defended by the common law, like any other property, during the whole term of its endurance. Many caſes may occur, where, from the artifice of offenders, the offence may be kept ſecret for more than three months; and thus the party injured is of neceſſity deprived of all action for the ſtatutory penalties; but it would be moſt abſurd to maintain, that the property conferred by the ſtatute is therefore not defenſible by the common law."

In

In this ſpecial caſe, even *the penalties* may be exacted, notwithſtanding the omiſſion in queſtion. If a book has not been regiſtered at Stationers Hall, the ſtatute preſumes, that any tranſgreſſion of the author's excluſive right has happened through ignorance, and on that account exempts the offender from penalties. This, no doubt, is a *præſumptio juris et de jure;* becauſe, when once received, it cannot be counteracted or excluded by any proof whatever. But the law does not preſume, in any caſe, that which is inconſiſtent with the caſe itſelf, or, in other words, what is abſurd. For example, the negative preſcription of *forty* years is founded on a *præſumptio juris et de jure* of dereliction, in conſequence of none of the rights of property having been exerciſed during that period. This is the general deſcription of the caſe to which the preſumption applies. But if a party has been *non valens agere*, a circumſtance abſolutely incompatible with the idea of negligence or dereliction, (for he who is *non valens* neither does nor omits any thing, and conſequently does not derelinquiſh), the preſumption becomes inadmiſſible, and of courſe preſcription cannot take place. Now, there enters into the preſent caſe an eſſential ingredient, which as certainly obſtructs the admiſſion of the *præſumptio juris et de jure* of the ſtatute in queſtion, as *non valentia agendi* does that of the act of parliament of 1469.

As it is neceſſary the law ſhould determine in every caſe ſubject to its deciſion, whilſt full evidence is but ſeldom to be obtained, it holds its *preſumptions* until they be diſproved *pro veritate*, in the ſame manner as if they were the reſult of demonſtrative evidence. One of the moſt unqueſtionable of theſe *preſumptions* is this, that if a man commits an act fraudulent in its own nature, he will be preſumed to have done ſo with the correſpondent fraudulent deſign, though poſſibly the act may be occaſioned by mere folly or caprice, or even by accident. If A enters the houſe of B, and by means of his aſſuming the character of the owner, appropriates or waſtes his goods, this no doubt may be owing to accident or miſtake; but the law in the mean time will preſume fraud. When Arnaud du Tilh took on him the character of Martin Guerre, and by counterfeiting his whole appearance uſurped his rights as a huſband, the law could not but preſume that which was the conſequence, to have been likewiſe the motive of the impoſture. *Cauſes Celebres*, vol. 1. p. 1. In like manner, when the defenders aſſumed the names and character of the purſuers, with every exterior mark diſtinguiſhing them as the publiſhers and the proprietors of the work in queſtion, and, with ſuch painful induſtry, ſurmounted all the difficulty of producing an exact counterfeit edition of their book, to paſs in the market for the true, is it not the preſumption of law, that this fraudulent act, a direct inſtance of the *crimen falſi*, (*vid.* Matth. and Carpzov.), was committed in order to the uſurping of that juſt and equitable right, no matter whether protected by the ſtatute or not, which belonged to the character thus counterfeited? Moſt certainly it is, and of neceſſity the *knowledge* of the right is implied. But this individual act of publication, and no other, is the violation of property here complained of: A caſe, therefore,

as

as incompatible with the *præſumptio juris et de jure* of ignorance, founded on the ſtatute under conſideration, as that of *non valentia agendi* is with the *præſumptio juris et de jure* of dereliction eſtabliſhed by the act of parliament of 1469.

Anſwered: 1. By the deciſion of the Court, in the caſe of Midwinter *contra* Hamilton, 7th June 1748, it was expreſsly "found, That "no action lies upon, or in conſequence of the ſtatute, but only for "the penalties:" A judgment which has ever ſince been held as eſtabliſhed law.

2. Regiſtration is a requiſite eſſential for founding the ſtatutory privilege; and the want of it cannot be ſupplied, either by the private knowledge of the defenders that the purſuers had a right under the ſtatute which they propoſed to exerciſe, or by any other means whatever. "If intimation, publication, or regiſtration, be required by law to complete a right, or even merely to certify the lieges of its exiſtence, the private knowledge of parties does in no caſe ſerve inſtead of legal form. Thus, a debtor's private knowledge of an aſſignation by his creditor will not ſupply the want of intimation, or put the debtor *in mala fide* to pay to the creditor denuded. In like manner, the private knowledge of an inhibition having been raiſed and executed will not prevent a party from contracting with the common debtor, unleſs the inhibition be likewiſe recorded."

Replied: 1. The judgment in the caſe of Midwinter is hardly to be deemed a final determination of the queſtion, Whether the ſtatutory right of property can be vindicated at common law? When that cauſe came by appeal before the Houſe of Lords, they did not conſider that point as properly brought under their conſideration; their deciſion being, "That the action ought to be diſmiſſed as irre-"levant, without prejudice to the points pleaded therein, when they "ſhould be properly brought in judgment."

2. The defenders reaſoning really affords an additional illuſtration of the purſuer's argument. If the law be as they ſuppoſe, then the want of intimation founds a *præſumptio juris et de jure* of ignorance, or *bona fides* in the debtor. But could this preſumption be admitted in behalf of a perſon who at the moment whilſt he pled it was, by means of a counterfeited conveyance or diſcharge of the debt, fabricated by himſelf in the name of the aſſignee, actually uſurping his right? See Dict. of Deciſ. vol. 3. *voc.* Aſſignation. Inhibition is nothing to the purpoſe. No diligence can add to the equitable foundation of a right: it is merely a legal engine; and if not properly completed, is good for nothing. A man, to be ſure, need not go to priſon becauſe his creditor is meditating a caption againſt him.

Pleaded for the purſuer, with reſpect to the action of damages at common law: The defenders, in publiſhing a ſpurious edition of the purſuer's book, have aſſumed the name, deſcription, and profeſſional character of the latter. This is a ſpecies of the *crimen falſi.* Voet, *ad*

tit. D. ad leg. Cornel de falſ. § 6. Carpzov. *Pract. crim. quæſt.* 93. And by it the beſt earned reputation for probity or mechanical ſkill may be ſacrificed to the avarice of any unprincipled individual. On this ground, then, a claim for damages at common law muſt lie. Viner's Abridgement, *voc.* Counterfeit.

Anſwered: " It is in vain to apply to the ordinary tranſactions of life abſtract and ſpeculative notions of right and wrong, as forming any invariable rule. There are in every profeſſion certain arts which practice has ſanctified, although neither from their nature nor object they could bear to be tried by the preciſe rules of morality; but which have at length become perfectly innocent, as every perſon lays his account with them, and deals accordingly." Of the truth of this obſervation the trade of printing or ſelling books has ever afforded a remarkable inſtance.

The Lord Ordinary reported the cauſe; when

With regard to the firſt ground of action, the Court ſeemed to be clearly of opinion, That as literary property was not protected by the common law, ſo no action could proceed on the ſtatute, except for thepe nalties there mentioned.——But

" The Lords found, That it was irregular and hurtful in the de-
" fenders to publiſh the work in queſtion with the names of the pur-
" ſuers affixed to the title-page; and therefore prohibited and diſ-
" charged them in time coming to ſell any copies of the ſaid work
" with ſuch title-page; and found them conjunctly and ſeverally liable
" in expences: And further found the defender William Anderſon
" liable in damages to the purſuers; which the Lords modified to
" the ſum of L. 20 Sterling."

Reporter, *Lord Juſtice-Clerk.* Act. *Blair, Fraſer-Tytler, Stewart.* Alt. *Lord Advocate, Dean of Faculty.* Clerk, *Sinclair.*

S.

N° CCCXLII.

N° CCCXLII. *July* 21. 1787.

DAVID DONALD,

AGAINST

ANNE KIRKALDY.

TENOR.—*Special* caſus amiſſionis *required, of a marriage-contract.*

JAMES DONALD, apothecary in Edinburgh, by his marriage-contract, ſettled on Anne Kirkaldy, his wife, a jointure of L. 50. One duplicate of the contract was retained by himſelf, another was delivered to her father.

During the marriage, Mr Donald's funds greatly increaſed; and when he died, he left heritage to the amount of L. 2000, and moveables equal to L. 5000 more. At this period neither of the duplicates of the contract of marriage could be found. The one delivered to the wife's father had been deſtroyed by him, at the deſire, as he ſaid, of Mr Donald; and of the other no account was given.

As there was no iſſue of the marriage, Mrs Donald, on the diſappearance of the contract, became intitled to a half of the moveable eſtate, beſides her intereſt in the heritage. David Donald, the brother and heir of James, was therefore induced to inſtitute againſt her a proceſs of proving the tenor of that deed.

Pleaded for the defender: As there are ſome obligations that are underſtood to be done away by the retiring of the deeds by which they were conſtituted, as bills or bonds for borrowed money, the law of courſe, whenever ſuch deeds diſappear, will preſume diſcharge. Before proving the tenor of them, therefore, this legal preſumption muſt be overcome by contrary evidence, ſhewing that the *caſus amiſſionis* is not incompatible with the ſubſiſtence of the obligation; or, in other words, "a ſpecial *caſus amiſſionis* muſt be proved;" Stair, b. 4. tit. 32. § 3. The contract in queſtion is an obligation of this kind, being in effect nothing more than a moveable bond of annuity, granted by one perſon to another; for as there were no children of the marriage, the intereſt of no other party was concerned.

There is, it is true, a different claſs of writings, which are not uſually underſtood to be extinguiſhed by ſimple retiring or cancelling, ſuch as in themſelves are incomplete, and ſubſiſt along with ſome collateral deed or right: For example, a writing on which infeftment has followed, or an aſſignation that has been intimated. In ſuch caſes,

caſes, people do not rely on cancellation alone; and to extinguiſh an infeftment, indeed, a ſpecific renunciation is required.

Anſwered: Writings of a permanent nature, or which, in the words of Lord Stair, "are deſigned to remain conſtantly, and not to be paid "and retired," do not, like retirable documents, require the proof of a ſpecial *caſus amiſſionis*; Stair, b. 4. tit. 32. § 3.; Bankton, b. 4. tit. 29. § 3.; Erſkine, b. 4. tit. 1. § 54. "Of all tranſactions, a marriage-ſettlement is perhaps the moſt ſolemn in its nature, and the moſt permanent in its effects. It is not retirable, like a bond or a bill, but is a family-compact, in which are involved the intereſts of different parties, ſome of them unborn, of huſband, wife, and iſſue." Accordingly the idea of undoing a contract of marriage, by ſimple retiring, has never been entertained in practice; and the Court, in judging of caſes of this kind, have been influenced by what it was uſual, rather than what it was poſſible to do; Dict. *voc.* Tenor, vol. 2. p. 445.; Dirleton, 9th June 1674, Cuningham; Lord Stair, 2d January 1680.

In the preſent caſe, though no children happened to exiſt, the age of both huſband and wife was ſuch as to render that a poſſible event; and therefore, before the death of one of them, they evidently had not even the power of annuling a contract in which other parties might have been ſo materially concerned. On that footing the matter ought to be judged of, and not as it ſtood after the huſband's death.

As the evidence adduced in the cauſe was ſuch as to corroborate the preſumption, ariſing from the non-appearance of the contract, that the huſband had purpoſed to undo it, the following interlocutor was pronounced.

"The Lords having adviſed the ſtate of the proceſs, writs produ-
"ced, teſtimonies of the witneſſes adduced, with the mutual memo-
"rials of the parties; and having heard their procurators thereupon;
"in reſpect of the ſpecial circumſtances appearing in evidence in this
"cauſe, they aſſoilzie the defender; and decern."

Act. *Lord Advocate, Geo. Ferguſſon.* Alt. *Dean of Faculty, Honyman, Corbet.*

S.

N° CCCXLIII.

N° CCCXLIII. *July* 25. 1787.

JAMES LISTER,

AGAINST

JOHN RAMSAY.

ARRESTMENT.—*The benefit of an arreſtment, how loſt by a delay on the part of the arreſter.*

JAMES LISTER, being creditor to Lilias Dewar, uſed arreſtment in the hands of one of her debtors in 1785. He immediately after brought an action of forthcoming, which was conjoined with an action of multiple-poinding raiſed by the arreſtee; and he obtained a decreet of preference.

Before this decreet was extracted, a claim was entered for John Ramſay, in virtue of an arreſtment which had been uſed by him three years before. But the Lord Ordinary, "on account of the *mora* on "the part of the claimant, of new decerned in the preference."

In ſupport of this judgment, which was afterwards brought under the review of the Court, James Liſter

Pleaded: Anciently the only effect of arreſtment was to prevent voluntary payments to the debtor himſelf. In a competition of creditors, it was not the perſon whoſe arreſtment was firſt executed, but he who firſt obtained a decreet of forthcoming, to whom the preference was given: and hence it ſometimes happened, that a prior arreſter, who had brought his action in the Court of Seſſion, was poſtponed to one who, having commenced the ſame action in an inferior court, had, from the ſhortneſs of the *inducia* there allowed, been able more ſpeedily to complete his diligence. In modern times, it is true, this ſtrictneſs has been conſiderably relaxed; but ſtill any unreaſonable delay will be fatal to the preference otherwiſe given to priority in date. A ſecond arreſter, therefore, who, without loſs of time, has brought his action, and who has obtained a decreet, ought certainly to be preferred to one who for years has neglected to follow out his diligence in a proper manner. Spottiſwoode, Harcus, *voc.* Arreſtment; Stair, book 2. tit. 35. § 6.; Bankton, book 3. tit. 1. § 43.; Erſkine, book 3. tit. 6. § 18.

Anſwered: Since the enactment of 1669, limiting the duration of arreſtments to five years, it does not appear that any other reſtraint

ought to be impoſed on the uſers of this mode of diligence. At any rate, the preference here awarded ſeems unſupported by any precedent. Whatever may have been the effect of arreſtment in the moſt ancient periods of our law, it has now for a long while been conſidered, not only to prohibit payments to the debtor, but alſo to create a certain *lien* or *nexus* in favour of the arreſter, which nothing but an extracted decreet of preference obtained by another creditor can effectually diſappoint. In the preſent caſe, as an action of multiplepoinding had been commenced, to which the firſt arreſter was a party, an extracted decreet in that proceſs would alſo have been neceſſary, to put the arreſtee in ſafety to pay to any other perſon.

" The Lords altered the interlocutor of the Lord Ordinary, and " found the firſt arreſter to be preferable."

Lord Ordinary, *Alva.* For John Ramſay, *M'Cormick.* For James Liſter, *Pattiſon.* Clerk, *Orme.*

C.

N° CCCXLIV. *July* 25. 1787.

JOHN MACADAM,

AGAINST

CREDITORS of CAMPBELL and COMPANY.

PENALTY.—*A creditor by heritable bond, though infeft, can claim the penalty to no greater extent than a perſonal creditor.*

IN the ranking of the creditors of Campbell and Company, Mr Macadam, a preferable creditor in virtue of an heritable bond, followed with infeftment, claimed to be ranked for the whole of the penalty therein contained. He had likewiſe deduced an adjudication on the bond.

Pleaded for Mr Macadam: By the infeftment on the bond, the ſame ſecurity is given for the penalty as for the principal ſum and annualrents; and therefore it is to be fully exacted; which is an equitable claim, ſeeing it will do no more than compenſate the loſs ariſing to this creditor from the long delayed payments of intereſt.

Anſwered: In the particular caſe of adjudication, the law allows creditors to rank for the full accumulate ſums, including penalties. But

But heritable bonds are in no other ſituation than perſonal, in which the penalty is reſtricted to the expence actually laid out by the creditor in recovering his money. For the penalties in his adjudication, Mr Macadam may be ranked *pari paſſu* with the other creditors.

The Lord Ordinary found, That Mr Macadam could only be ranked for his principal ſum and annualrent, and for the penalty to the extent of the expences incurred; reſerving his claim upon his adjudication. And

The Lords adhered to the interlocutor of the Lord Ordinary.

Lord Ordinary, *Alva.* For Mr Macadam, *C. Brown.* Alt. *Blair.*
Clerk, *Robertſon.*

S.

N° CCCXLV. *Auguſt* 2. 1787.

RICHARD HOTCHKIS,

AGAINST

JAMES EYRE.

POINDING.—Act 20th Geo. II. c. 48. *A poinding commenced within the head burgh of a ſhire, muſt be completed at the market-croſs of the burgh.*

IN executing a poinding of effects found in the New Town of Edinburgh, the meſſenger employed by James Eyre, appriſed them the ſecond time at the market-croſs of Canongate, inſtead of that of the burgh.

His reaſon for this procedure was expreſſed in the execution, "That the new bridge being then impaſſable with carts, on account "of ſome repairs which were carrying on, he found, in the circuit "he was thus obliged to make, that the market-croſs of Canongate "was nearer than that of Edinburgh."

Richard Hotchkis, as truſtee for the other creditors of the perſon to whom the effects belonged, brought an action for ſetting aſide the poinding as informal; when it was

Pleaded in defence: In poindings it was formerly neceſſary that the ſecond appretiation ſhould invariably be performed at the market-

ket-croſs of the head burgh of the ſhire. This, however, was altered by the ſtatute of 1748, whereby it was, among other things, enacted, "That it ſhould and might be lawful to carry goods pointed to the "neareſt market-croſs." By theſe words muſt be meant, that market-croſs which is moſt convenient for the completion of the diligence; otherwiſe this enactment, intended for the accommodation of creditors, would prove a ſnare to them.

Anſwered: When, by the ſtatute of his late Majeſty, creditors were allowed to follow out a poinding, either at the market-croſs of the head burgh, or at the neareſt market-croſs, it never could be intended to authoriſe the execution of that diligence where-ever it was moſt agreeable or convenient for the perſon employed for this purpoſe. Such an arbitrary power lodged in a meſſenger would be extremely inexpedient; and it would be equally unjuſt; becauſe the opportunity which the law has afforded to the unfortunate debtor, of redeeming his effects, even after the ſecond appretiation, might in this manner be fruſtrated. The preſent queſtion, however, does not reſt on any argument of that ſort. It never can be imagined, that a poinding commenced in the head burgh itſelf may, in conſequence of the ſtatute, be completed within a different juriſdiction.

The Lords, in general, were of opinion, That the validity of a poinding would not depend on the meſſenger's having gone to the market-croſs which was neareſt in a direct line to the place where the effects were diſcovered. In this caſe they thought that the ſtatute of Geo. II. was quite inapplicable.

"The Lords ſuſtained the objection to the formality of the poind-"ing."

Lord Ordinary, *Swinton.* Act. *Fraſer-Tytler.* Alt. *Dean of Faculty, Hope.* Clerk, *Colquhoun.*

C.

N° CCCXLVI.

N° CCCXLVI. *Auguſt* 8. 1787.

CREDITORS of Sir JOHN SINCLAIR,

AGAINST

Captain JAMES SUTHERLAND.

PERSONAL AND REAL.—*Payment of rents by a tenant, after his landlord's death, in virtue of a ſpecial authority contained in his leaſe, found effectual againſt the creditors of the landlord, who afterwards attached the lands, by adjudications* contra hæreditatem jacentem.

IN conſequence of a ſtipulation contained in a leaſe granted by Sir John Sinclair of Mey to Captain Sutherland, the latter, after the death of the former, made ſeveral payments to Sir John's creditors.

Several years afterwards, the other creditors deduced adjudications *contra hæreditatem jacentem*, and ſued the tenant for the whole rents which aroſe after that period, as being all attached by ſuch adjudications.

The defender *pleaded:* If, before the death of the landlord, and after the payments made by the defender, a creditor of the former had adjudged his eſtate, the latter would have been entitled to plead, that by ſuch payments, made under the authority of the landlord, the poſterior rents were ſo far actually extinguiſhed; and that therefore he could not be liable for them; although perhaps the ſame plea could not be maintained againſt a *bona fide* purchaſer. The effect of adjudication *contra hæreditatem jacentem*, is clearly at leaſt no ſtronger than that of other adjudications. If the heir of Sir John Sinclair had not renounced, the adjudication of the creditors would not have been *contra hæreditatem jacentem;* in which caſe they would not have competed with the defender; and it would be ſtrange if the renunciation of the heir ſhould beſtow the preference upon them. It is clear, they thus come into the place of the heir; and the ſame obligation which he would have lain under muſt fall upon them.

Anſwered: By adjudication *contra hæreditatem jacentem*, not only lands themſelves, " but the bygone rents and the duties thereof pre-

" ceding the adjudication and after the defunct's death, may be ad-
" judged;" Stair, b. 3. tit. 2. § 48. Accordingly such adjudication was found preferable to an assignation of mails and duties, with respect to the rents falling due between the proprietor's death and the date of the adjudications. Nothing less than a real right can be effectual, either against singular successors, or against creditors by whom real diligence has been used.

The Lords at first found, " That the defender was not entitled to
" plead retention of the rents of the unentailed lands which fell
" due after the death of Sir John Sinclair, and to apply said rents
" in payment of debts due by Sir John, to the prejudice of those
" creditors of Sir John who have obtained decreets of adjudication
" *cognitionis causa* against Sir John's heir."

But this interlocutor being brought under review,

The Court " found, That the defender is entitled to take credit for
" the rents falling due between the death of Sir John Sinclair and
" the adjudications led *contra hæreditatem jacentem*, to the extent of
" the debts paid by him."

To this judgment the Court adhered, after advising a reclaiming petition and answers.

Lord Ordinary, *Alva.* Act. *Dean of Faculty.* Alt. *Honyman.* Clerk, *Orme.*

S.

N° CCCXLVII.

N° CCCXLVII. *Auguſt* 8. 1787.

LORD ANKERVILLE, and others,

AGAINST

JAMES SAUNDERS, and others.

INHIBITION—*Not competent to render effectual againſt creditors a deed by which a perſon obliges himſelf, in favour of others, not to ſell or impignorate his lands, nor to contract debt by which they may be burdened.*

MR Ross-MONRO of Newmore entered into a contract with Lord Ankerville, and other perſons, nominated as his ſucceſſors in that eſtate, by a deed of ſettlement executed by Lieutenant-Colonel Monro, his predeceſſor, which, however, left him at liberty to ſell the eſtate or burden it with debts.

By this contract, Mr Roſs-Monro "bound and obliged himſelf, "and his heirs, that he ſhould in no wiſe alter, innovate, or change "the courſe and order of ſucceſſion of the ſaid eſtate, as eſtabliſhed "by the diſpoſition and deſtination executed by the deceaſed Lieute-"nant-Colonel John Monro, nor do any act or deed, directly or in-"directly, that may fruſtrate the ſame: And further bound and ob-"liged himſelf, and his aforeſaid, that he ſhould not ſell, diſpone, "wadſet, or impignorate the lands and eſtate above mentioned, or "any part or portion thereof, nor grant infeftment of annualrent or "annuity forth of the ſame, or any other right, redeemable or irre-"deemable, whatſoever; nor ſhould he contract debt, nor do any "other fact or deed, whereby the lands may be any wiſe burdened."

Upon this contract letters of inhibition were raiſed, which were regularly recorded.

Afterwards Mr Roſs-Monro contracted various debts; and Mr Saunders, as creditor in theſe, having deduced an adjudication of the eſtate, Lord Ankerville inſtituted a reduction of thoſe debts; and

Pleaded: As a proprietor may ſell his eſtate, or affect it with debt, ſo he may oblige himſelf, in favour of another party, to preſerve it free from debt. This perſonal obligation may be rendered by inhibition, as in the preſent caſe, effectual againſt ſingular ſucceſſors. Every lawful obligation, whether reſpecting the payment of money, or the conveyance of land, may be thus ſecured: For example, a minute of ſale, or (as was found 22d July 1724, Douglas *contra* Douglas) an

an obligation in a marriage-contract by the husband, to settle a land-estate upon the wife and children. Nor does the case of entails afford any exception to this rule; being regulated by a special enactment, and not by the common law.

Answered: Inhibition is limited to such cases as admit of that diligence being purged by payment of the debt on which it proceeds, or by finding caution, and does not, as here argued, operate a permanent or general incapacity to contract debts. This appears from Lord Stair, b. 4. tit. 20. § 28. where a specimen of the proper style of inhibition is given. Such restraint is only permitted with respect to entailed property, guarded by irritant and resolutive clauses: for prohibitory clauses have not that effect, though followed by inhibition; Fac. Coll. 22d January 1760, Bryson *contra* Chapman: And if so, the use of that diligence in the present case must be equally unavailing. It is indeed an attempt to construct an entail in a way which the law does not authorise.

The Lord Ordinary reported the cause; when

The Court were clearly of opinion, That the inhibition was inept and unavailing; but decerned in favour of the pursuer, on a different ground.

Reporter, *Lord Henderland.* Act. *Rolland.* Alt. *Blair.* Clerk, *Menzies.*

S.



APPENDIX.

APPENDIX.

(N° I.) *November* 26. 1782.

JUSTICIARY-COURT.

KING's ADVOCATE,

AGAINST

JAMES MACAFEE.

FORGERY.—*Uttering forged notes—capital.*

THE pannel having been found guilty of fraudulently uttering five forged notes, in imitation of thoſe iſſued by the Britiſh Linen Company, it was debated, whether his crime was capital or not.

Pleaded for the pannel: Unleſs in particular caſes, Reg. Majeſt. lib. 4. c. 13. the crime of forgery itſelf, by the ancient law of Scotland, Statut. Alex. c. 19.; 1540, c. 80.; 1551, c. 22. was not puniſhed with death, but with "proſcription, baniſhing, and diſmember-"ing of the hand and tongue, and *other pains*." By which laſt expreſſion, according to the eſtabliſhed rules of legal interpretation, no heavier puniſhments can be underſtood than thoſe particularly mentioned.

Nor from the more recent practice of puniſhing capitally the actual forgery of writings of importance, particularly of the notes circulated by trading companies, will it follow, that the ſimple uttering, in its nature clearly different from the deliberation and criminality of the former, ſhould be puniſhed in the ſame manner. Upon this principle it is, that although the coining of falſe money is, by act 1696, c. 42. made capital, the uſing money ſo coined, is attended only with an arbitrary puniſhment. In England, too, it has been thought neceſſary to extend the penalties impoſed on forgers, to perſons guilty of uttering, by an expreſs enactment, 2. Geo. II. c. 25. in which, it is to be remarked, a ſpecial proviſion occurs, that it ſhall not be underſtood to relate to Scotland.

Accordingly no inſtance can be adduced, where the crime of uttering alone has been tried capitally. In the caſe of William and James Baillie, in 1715, the pannels were accuſed of forgery, *and* uſing a falſe

certificate. In that of Margaret Niſbet, in 1727, the verdict found the pannel " guilty actor, or art and part, in the forgery libelled." In the ſame manner, John Young, tried in 1750; John Raybould, in 1768; William Herries, in 1770; and David Reid, in 1780; were convicted of forgery, *as alſo* of uttering forged writings. In the trial of Andrew Adam in 1709, the interlocutor on the relevancy found, " That the pannel's actual forgery, or cauſing or enticing others to " forge the ſubſcription to a bond of cautionry, or his giving in the " ſame *with his own hand* to the bill-chamber, inferred the pains of " death; and that the pannel's uſe-making of the ſuſpenſion obtain- " ed on the ſaid bond of cautionry, was relevant to infer an arbitrary " puniſhment;" from whence it may be juſtly argued, that the uttering, unleſs attended with circumſtances which eſtabliſh the actual forgery againſt the party accuſed, is never puniſhed in the ſame degree with the fabrication. And Lord Stair, January 29. 1670, Lady Towie *contra* Barclay and others, reports the opinion of the Court, that the parties having uſed a forged bond for a great ſum of money, were ſubjected only to baniſhment.

Anſwered: While the art of writing was confined to the Romiſh clergy, who were exempted from the juriſdiction of temporal courts, the nature of the crime of falſehood, in which is included that of uttering falſe writings, was not well aſcertained. In the ſtatutes quoted, a reference is made to the Civil law, where it was puniſhed *pro qualitate admiſſi, l.* 1. *&* 5. *C. Ad Leg. Cornel. de Falſis.* Accordingly, ſo early as the year 1623, and in a variety of late inſtances, it has been attended with a capital puniſhment.

The condition of a perſon guilty of fraudulently uſing falſe writings cannot in reaſon be diſtinguiſhed from that of the actual forger. Nor can his puniſhment be mitigated, without affording in the ſame proportion impunity to offenders. In both caſes, the degree of puniſhment, which in this country is very rarely regulated by expreſs ſtatute, muſt be accommodated to the particular circumſtances of every offence. Nor can leſs than a capital puniſhment be deemed adequate to one ſo criminal in itſelf, and ſo fatal in its conſequences, as that of which this pannel has been found guilty.

The pannel had been alſo found guilty of acceſſion to the actual forgery of the notes in queſtion; and a ſeeming informality in that part of the verdict gave riſe to the foregoing argument. All the Judges, however, one only excepted, delivered their opinions, that the uttering in this caſe was capital. It was at the ſame time obſerved, that the pannel's uttering in Scotland the notes in queſtion, which had been forged in Ireland, created a ſtrong preſumption of his participation of the forgery.

Sentence of death was pronounced againſt the pannel.

Act. King's Counſel, *Maclaurin, Croſbie.* Alt. *Geo. Ferguſſon, Adam Ogilvie.*

C.

(N° II.) *July* 8. 1784.

HOUSE OF LORDS.

The MINISTER of KIRKDEN,

AGAINST

The HERITORS.

JURISDICTION. *Competency of an appeal to the Houſe of Peers, from a judgment of the Court of Seſſion, as Commiſſioners of Tithes.*

TEINDS,—*Court of Seſſion not barred from granting a ſecond augmentation, by an antecedent one poſterior to the year* 1707.

THE ſtipend payable to the miniſters of the pariſh of Kirkden was augmented in the year 1716. The preſent incumbent, however, diſſatisfied with that allowance, brought a proceſs of augmentation, which was diſmiſſed, in reſpect of the rule of Court, that no new augmentation ſhould be granted where one had been obtained ſince the Union.

The action was afterwards carried, by appeal, to the Houſe of Lords; when it was objected by the heritors, that becauſe the Court of Seſſion judged in queſtions of this ſort as a Committee of Parliament, and as veſted with ſpecial powers from the Legiſlature, their deciſions were not ſubject to review. In ſupport of this objection, they

Pleaded: The ſubject of the juriſdiction granted to the Commiſſioners of Tithes before the Union, was not a matter of civil right, nor cogniſable by the ordinary courts of law. The Judges were compoſed of a certain number of perſons out of the three Eſtates in Parliament, and their proceedings were declared to have the ſtrength and authority of an act of the Legiſlature; 1617, c. 7; 1621, c. 5.; 1633, c. 19.; 1661, c. 61.; 1663, c. 28.; 1672, c. 15.; 1685, c. 8.; 1686, c. 22.; 1690, c. 30.; 1693, c. 23. The ſame authority muſt undoubtedly belong to the Court of Seſſion, erected by the ſtatute 1707,

c. 9. into a perpetual Commiſſion of Tithes, and empowered " to " cognoſce and determine in all matters referred by the former laws " to the courts of commiſſion, conform to the rules laid down, and " powers granted by the ſtatute 1633, and other acts already " mentioned."

Anſwered: That the Commiſſioners of Teinds, before the Union, were not a Committee of Parliament, is apparent from their having continued to act after the Parliaments which created them were diſſolved; Forbes on Tithes, p. 274, 275. Their determinations indeed were not ſubject to the review of any other court; a circumſtance which did not ariſe from the nature of their juriſdiction, but from the ſpecial clauſes occurring in the ſtatutes quoted on the other ſide. Nor were the parties aggrieved by their proceedings altogether deſtitute of redreſs, as would infallibly happen at preſent, if no appeal lay from the Court of Seſſion, as coming in their place. A power was lodged in the commiſſion of 1633, in thoſe of 1663, 1672, 1686, 1690, and 1693, to rectify " whatſoever valuations led, or to be led, " to the enormous prejudice of titulars, or of the heritors, or to the " hurt and detriment of the church, and prejudice of the miniſters " maintenance and proviſion."

After the eſtabliſhment, however, of the perpetual commiſſion in 1707, though the forms of procedure and rights of the parties remained the ſame, the other peculiarities of the former courts were completely done away. Not only were the anxious clauſes, giving the ſtrength and permanency of an act of Parliament to the ſentences pronounced by the old commiſſions omitted, but it is alſo expreſsly declared, that the efficacy of the judgments of the Court of Seſſion, in this branch of their juriſdiction, ſhall be the ſame as in other civil cauſes. The courſe of the common law then being no longer obſtructed, as in the temporary commiſſions, the ſuperintendence of the Houſe of Lords, as the univerſal appellate juriſdiction, ſeems altogether unqueſtionable. In effect they have frequently exerciſed in this matter their power of review; 20th March 1710, Durham *contra* the Heritors of Largo; 13th July 1713, Sir Hugh Paterſon *contra* the Moderator of the Preſbytery of Stirling; 11th June 1714, Lord Blantyre *contra* Currie; 15th June 1714, Scott *contra* the Magiſtrates of Montroſe; March 1735, Earl of Galloway *contra* the Heritors of Whithorn; 26th February 1757, Marquis of Tweeddale *contra* Anſtruther; 25th July 1757, Marquis of Tweeddale *contra* Dundas; 15th March 1758, King's Advocate *contra* the Duke of Montroſe; 17th February 1766, the Magiſtrates of Edinburgh *contra* the Miniſters.

On the merits of the judgment of the Court of Seſſion, the Heritors farther

Pleaded: Without ſome regulation, limiting within certain bounds the right of applying for an increaſe of ſtipend, the authority of the Court of Tithes would be the ſource of perpetual litigation and diſquiet, both to laity and clergy. The determination of the Court, therefore, to refuſe a ſecond augmentation ſince the year 1707, which has

has been matured into an invariable rule, is in itſelf moſt wiſe and ſalutary; nor is it altogether unſupported by the ſtatute, the powers of the Court of Seſſion with regard to tithes not being more ample than thoſe of the ancient commiſſions, which had no authority, without a ſpecial warrant from the Legiſlature, to review or vary their own decreets.

Anſwered: It cannot be from any defect in the juriſdiction of the Court of Seſſion as a commiſſion of tithes, that it refuſes to increaſe ſtipends augmented ſince the Union; for the ſtatute, by a reference to ſuch of the former commiſſions as had a power of reviewing their own decreets, has inveſted it with the ſame authority. Nor can it be well ſupported on any other ground, it being the province of the legiſlature alone to limit, by a regulation ſo general and arbitrary, the interpoſition of courts of law. Indeed the propriety of ſuch a reſtriction may juſtly be called in queſtion; for if by an alteration in the mode of living, or by an enlargement of the fund out of which the ſtipend is payable, the ſituation of a pariſh be greatly altered ſince the year 1707, why ſhould the incumbent be reſtrained from obtaining a ſuitable addition to his income? or where is the juſtice in determining that a liberal proviſion, granted on the day the commiſſion 1693 expired, ſhould yet admit of increaſe, while the moſt ſcanty one beſtowed by the commiſſion in 1707 muſt remain unalterable? Nor are precedents awanting to juſtify a deviation even from this rule, which, it is to be remarked, is neither publiſhed in the records, nor in any book of practice.

Ordered and adjudged, "That the interlocutors complained of, be "reverſed, and the cauſe remitted to the Court of Seſſion to proceed "accordingly."

C.

(N° III.) *March* 10. 1784.

Sir ARCHIBALD GRANT,

AGAINST

WILLIAM SHERRIS.

HYPOTHEC. *Whether a landlord is entitled to obtain a warrant for rouping the ſequeſtrated effects of his tenant,* currente termino.

SHERRIS, the tenant of a farm belonging to Sir Archibald Grant, had been, in an action founded on the act of ſederunt 1756, decerned to remove from his poſſeſſion at Whitſunday 1783; but having

ving previouſly ſown his corn, he became entitled to reap the crop of that year, for which one half of the rent was payable at the enſuing term of Martinmas, and the other at Whitſunday 1784.

In November 1783, the landlord preſented a petition to the ſheriff of the county, ſetting forth, That the tenant had already ſent part of his corn off the farm, and craving warrant "for immediate ſequeſtrating, and alſo rouping as much of the crop as would pay the rents claimed, credit of the roup-price being given to Whitſunday next, the laſt conventional term of payment."

The ſheriff ordered the petition to be ſerved on the tenant, who failed to make any appearance; upon which he awarded the ſequeſtration, but confined his warrant for rouping to ſuch part of the corn as was equivalent to the rent "already due and payable."

The landlord brought the ſheriff's judgment under review by bill of advocation; when the following interlocutor was pronounced by the Lord Ordinary on the bills: "Having conſidered this bill of advocation, the Lord Ordinary is of opinion, that the ſheriff of Aberdeen has committed no iniquity; and therefore refuſes the bill."

The landlord reclaimed to the Court; but no anſwers to his petition were given in, the tenant having ſtill declined to appear.

The Court deſired of the Sheriffs-depute of the ſeveral counties, information concerning the practice in ſuch caſes. From their reports it appeared, that, in general, it was not cuſtomary to grant warrant for ſelling the ſubjects of the hypothec before the term of payment, though in ſome counties this had been done. The interlocutor of the Court, which did not ſeem to have been influenced by theſe reports, was the following:

"The Lords remit to the Lord Elliock Ordinary, to remit the cauſe to the Sheriff, with this inſtruction, That he grant warrant to roup as much of the corns ſequeſtrated as ſhall be ſufficient to pay the whole hypothecated rents and expences; the produce of the roup to be lodged in the Sheriff-clerk's hands, ſubject to the further orders of the Sheriff."

Lord Ordinary, *Elliock* For the Petitioner, *Solicitor-General.*

S.

(N° IV.)

(N° IV.) *March* 19. 1783.

JUSTICIARY COURT.

YOUNG and WEMYSS,

AGAINST

The PROCURATOR-FISCAL of the City of EDINBURGH.

JURY-TRIAL,—*Not requiſite to the cogniſance of* leviora delicta.

YOUNG and WEMYSS having been accuſed of committing a riot, in which they aſſaulted and wounded ſeveral people, were brought to trial for that crime before the magiſtrates of Edinburgh; the indictment concluding, "That they ought not only to be puniſhed in "their perſons, by whipping, baniſhment, pillory, impriſonment or "otherwiſe, as to the magiſtrates ſhall ſeem meet; but ought alſo to "be fined in the ſum of L. 50 each, payable to the complainers." Thoſe Judges, without the intervention of a jury, proceeded to take cogniſance of the offence, and pronounced a ſentence againſt the culprits, ordaining the puniſhment of whipping to be inflicted. From this judgment they appealed to the High Court of Juſticiary, alleging, that there was not any legal proof of their guilt, nor could there be, unleſs it were eſtabliſhed by the verdict of a jury. Certain objections to the form of the libel were likewiſe ſtated.

The Court ordered, That information ſhould be laid before them, concerning the practice of the inferior judicatures, in the trial of crimes not inferring death or demembration. Reports on this ſubject were accordingly made from a conſiderable number of ſheriff-courts, and alſo from the courts of many royal boroughs. By theſe it appeared, that the uſe of jury-trial, in caſes like the preſent, had prevailed in the ſheriff-courts, with the exception of the county of Mid Lothian; but that in the royal boroughs, the town of Ayr

alone excepted, ſuch inſtances of the interpoſition of juries had ſeldom or never occurred.

A hearing in preſence was then appointed by the Court, and a learned argument was maintained by the counſel for the priſoners, tending to evince the legality and the expediency of jury-trial, in the cogniſance of all crimes attended with any corporal puniſhment; it being admitted that fines might be impoſed by the ſole authority of the Judge. The counſel for the Crown, who agreed to argue the point on the part of the public, controverted the plea of the priſoners as to impriſonment only. But the Court delivered an oppoſite opinion.

Their Lordſhips conſidered, That if the ſolemnity and detail of jury-trial were to be extended to petty crimes, the ſame frequency of commiſſion which demands a ſteady and uniform infliction of puniſhment, would often render unavoidable the impunity of the offenders. Accordingly, it was obſerved, at no period of our law has the intervention of juries been required in the trial of thoſe offences to which the ſmaller corporal puniſhments, ſuch as are ſhort of life or demembration, are annexed. The Court therefore were unanimous in rejecting this reaſon of appeal. The judgment of the magiſtrates, however, it may remarked, from the informalities objected to in the libel, was found to be ineffectual.

Counſel for the Crown, *Solicitor-General I. Campbell, et alii.*
For the Priſoners, *H. Erſkine et Honyman.*

S.

(N° V.) *Eod. die.*

WILLIAM BROWN and others,

AGAINST

The PROCURATOR-FISCAL of the Sheriff-Court of EDINBURGH.

JURY-TRIAL—*indiſpenſable where the higher crimes are charged, though inferior puniſhments be libelled.*

WILLIAM BROWN and others were indicted before the ſheriff-depute of Edinburgh, for aſſaulting, wounding, and intending to murder certain perſons in the ſtreets of that city, and for *maſterful* theft

theft of ſome of their wearing apparel; the libel concluding for the ſame corporal puniſhments as thoſe ſpecified in the foregoing report. In this caſe, likewiſe, ſentence was pronounced without the interpoſition of a jury, and the priſoners appealed to the High Court of Juſticiary.

But here the Court, conſidering the crime charged to be of a higher nature than that which occurred in the former inſtance, though the puniſhments ſought by the proſecutor in both were equal, unanimouſly determined, agreeably to the judgment pronounced on the caſe of Leonardo Piſcatori, 17th January 1771, that the trial by jury was indiſpenſable.

S.

(N° VI.) *January* 25. 1785.

JAMES and WILLIAM STEWART, and His MAJESTY's Advocate,

AGAINST

GEORGE STORY.

MURDER.—*A verdict returned, and approved of by the Court, finding that the pannel had not been guilty of* Murder, *but of* Culpable Homicide.

GEORGE STORY was brought to trial by the ſon and father of the deceaſed William Stewart, ſurgeon in Paiſley, and by the King's Advocate for the public intereſt.

In the major propoſition of the indictment, it was ſet forth, That murder, eſpecially the murdering of a perſon in his own ſhop, was a crime of a heinous nature, and ſeverely puniſhable.

The minor propoſition proceeded to allege, That the pannel having conceived a previous ill-will at the deceaſed, did wickedly and feloniouſly attack him in his own ſhop, breaking ſeveral bottles full of ſome liquid ſubſtance over his head, till the blood guſhed from him: That having afterwards thrown him upon the ground, and while he was unable to defend himſelf, the pannel had beat him with his hands, and trampled him under his feet, till he was at length reſcued by ſome people coming into the ſhop: And that, notwithſtanding every care having been taken of the deceaſed, he had languiſhed five days, and then died of the hurts he had received from the pannel.

The

The defences urged for the pannel were, That he had always lived on the beſt terms of friendſhip with the deceaſed, to whom he was nearly allied by marriage: That the deceaſed having, at different times, thrown a quantity of *aſſa fœtida* on the pannel's clothes, the pannel had threatened to break all the bottles in his ſhop; and ſoon after, being much intoxicated, he had gone into the ſhop of the deceaſed, and had thrown ſeveral bottles at him and his apprentices; but without any intention to hurt, far leſs to deprive him of his life.

Some exceptions likewiſe were taken to the relevancy of the indictment, which however the Court ſuſtained as relevant to infer the pains of law; but at the ſame time allowed the pannel a proof of all circumſtances tending to exculpate him, or to alleviate his guilt. And the jury returned a verdict, " That the pannel, George Story, " was *not* guilty of the *murder* libelled; but that he was guilty of *cul-* " *pable homicide*."

This verdict was approved of by the Court, who pronounced the following ſentence.

" In reſpect of this verdict, The Lords find the pannel liable in an " aſſythment to John Stewart, private proſecutor, for himſelf, and in " behalf of the other neareſt of kin of the deceaſed William Stewart; " and having conſidered the circumſtances of the pannel, they modi- " fied the ſame to the ſum of 1000 merks: Farther, they adjudge the " pannel to be committed priſoner to the tolbooth of Paiſley for the " ſpace of eight months, and thereafter till payment of the ſaid aſ- " ſythment, and alſo until he find ſecurity, in the books of adjournal, " to keep the peace for the ſpace of two years, under the penalty of " 2000 merks Scots."

Act. *Lord Advocate Campbell, Solicitor-General Dundas, W. Craig, A. Campbell, J. W. Murray.*
Alt. *Maclaurin, Cullen.*

C.



(N° VII.)

APPENDIX.

(N° VII.) *February* 8. 1785.

ANNE DRUMMOND,

AGAINST

CREDITORS of JAMES DRUMMOND.

BILL OF EXCHANGE.—*A bill not ſubſcribed by the drawer, ſuſtained as a document of debt.*

JAMES DRUMMOND ſubſcribed as the acceptor of a bill drawn in theſe terms: "Againſt Martinmas next, pay to Anne Drummond, "or order, the ſum of 1035 merks, for value." But there was no ſubſcription of the drawer.

It was objected by the other creditors of James Drummond, That a bill not ſubſcribed by the drawer, though accepted, could not be ſuſtained as a ground of debt.

But as the creditor's name was inſerted in the body of the bill in queſtion, and thus there occurred all the eſſential requiſites of a promiſſory note,

The Court repelled the objection.

Act. *Drummond.* Alt. *Dickſon.* Clerk, *Menzies.*

S.

(N° VIII.) *November* 22. 1786.

ALEXANDER HARE,

AGAINST

JEAN GEDDES, and others.

BILL OF EXCHANGE.—*A bill not ſubſcribed by the drawer, ſuſtained.*

IN this caſe, being a competition of creditors, the objection was made to an accepted bill, That it was not ſubſcribed by the drawer; which objection the Court conſidered to be obviated by the circumſtance of the creditor's name being indorſed on the bill, over which ſtood receipts for partial payments. The name of the drawer was likewiſe inſerted *in gremio* of the bill.

The Court therefore repelled the objection.

Act. *Honyman.* Alt. *Dalzell.* Clerk, *Home.*

S.

ABSTRACT



ABSTRACT

OF THE

JUDGMENTS of the HOUSE OF LORDS,

IN THE

CASES contained in this VOLUME.

N° X. *April* 15. 1782.

WILLIAM ROSE,

AGAINST

Sir LUDOVICK GRANT, Baronet.

"ORDERED and *adjudged*, That the appeal be diſmiſſed, and the "interlocutors complained of affirmed."

N° XVI. *June* 25. 1782.

JANET MACINNES,

AGAINST

ALEXANDER MORE.

"It is *DECLARED*, That the written acknowledgment is not "ſufficient proof of any marriage or matrimonal contract having "paſſed between the purſuer and defender; *and* it is therefore *or-* "*dered* and *adjudged*, That the interlocutors complained of be re- "verſed; and that the Court of Seſſion do remit the cauſe to the "Commiſſaries, with directions to find, That the ſaid written ac- "knowledgment is not ſufficient proof of any marriage or matri- "monial contract having paſſed between the purſuer and defender; "and to proceed accordingly."

N° LVI.

N° LVI. *May* 12. 1783.

HODGSON and DONALDSON,

AGAINST

BUSHBY.

" *ORDERED* and *adjudged*, That the appeal be diſmiſſed, and the " interlocutors complained of reverſed; and that the interlocutor of " the Lord Ordinary of 3d July 1781 be affirmed."

N° XCVII. *May* 21. 1783.

Sir THOMAS DUNDAS,

AGAINST

THOMAS DUNDAS, and others.

" *ORDERED* and *adjudged*, That the interlocutor complained of " be reverſed, in ſo far as it finds that the deed of entail libelled on is " effectually revoked by the deed executed by Sir Laurence Dundas " on the 14th February 1779; and that the cauſe be remitted back " to the Court of Seſſion in Scotland, to carry this judgment into " execution."

N° CIII. *June* 17. 1784.

Mrs DALRYMPLE and SON,

AGAINST

COUNTESS of GLENCAIRN, and others.

" *ORDERED* and *adjudged*, That the appeal be diſmiſſed, and the " interlocutors therein complained of affirmed."

N° CXVIII.

N° CXVIII. *July* 24. 1784.

LADY MARY CAMPBELL,

AGAINST

GEORGE EARL of CRAUFURD.

" It is *DECLARED*, *in hoc ſtatu*, the reſpondents are entitled to " the production ſought for in the condeſcendence, without prejudice " to any other queſtion in this or any other cauſe between the par- " ties; *and* therefore *ordered* and *adjudged*, That the interlocutors " complained of be affirmed."

N° CXXX. CXLI. & CXLII. *April* 4. 1785.

Apparent Heir of PORTEOUS,

AGAINST

Sir JAMES NASMITH.

" *ORDERED* and *adjudged*, That the appeal be diſmiſſed, and the " interlocutors complained of affirmed."

N° CLXXII. *March* 21. 1785.

EARL of HOPETOUN,

AGAINST

The CREDITORS of the YORK-BUILDINGS COMPANY.

" *ORDERED* and *adjudged*, That the appeal be diſmiſſed, and the " interlocutors complained of affirmed."

N° CLXXI. *April* 15. 1785.

Sir JAMES GRANT,

AGAINST

The CREDITORS of the YORK-BUILDINGS COMPANY.

" *ORDERED* and *adjudged*, That the interlocutors complained of " be reverſed, without prejudice to the points therein decided; *and* " farther *ordered*, That the cauſe be remitted back to the Court of " Seſſion, with a direction to proceed thereupon according to ju- " ſtice."

N° XXII. *May* 6. 1785.

ELISABETH CHALMERS,

AGAINST

HELEN DOUGLAS.

" *ORDERED* and *adjudged*, That the appeal be dismissed, and the " interlocutors complained of affirmed."

N° CXCVI. *April* 11. 1786.

JAMES HILL,

AGAINST

GEORGE and JOHN BUCHANAN.

" *ORDERED*, That the appeal be dismissed, and the interlocutors " complained of be affirmed."

N° CCLX. *February* 16. 1787.

PATRICK TAYLOR,

AGAINST

AGNES KELLO.

" It is *DECLARED*, That the two letters insisted upon in this pro- " cess, signed by the parties respectively, and mutually exchanged, " were not intended by either, or understood by the other, as a final " agreement; nor was it so intended or understood, that they had " thereby contracted the state of matrimony, or the relation of hus- " band and wife, from the date thereof: on the contrary, it was ex- " pressly agreed, that the same should be delivered up, if, the purpose " they were calculated to serve proving unattainable, such delivery " should be demanded; which last mentioned agreement is farther " proved by the whole and uniform subsequent conduct of both par- " ties: Therefore *ordered* and *adjudged*, That the interlocutors com- " plained of be reversed; and that the Court of Session do remit the " cause to the Commissaries, with instructions to assoilzie from the " declarator of marriage."

N° CCLXII.

N° CCLXII. *February* 14. 1787.

HELEN INGLIS,

AGAINST

ALEXANDER ROBERTSON.

" *ORDERED* and *adjudged*, That the appeal be dismissed, and the " interlocutors complained of be affirmed."

N° CLIV. *April* 2. 1787.

ELISABETH ROSE,

AGAINST

JAMES ROSE.

N° CCXLVII. *Eod. die.*

EADEM,

CONTRA

EUNDEM.

" *ORDERED*, That the interlocutor of the 10th March 1784, in " so far as the same sustains the reasons of reduction as to the pro- " perty of the lands and barony of Kilravock, be *affirmed;* and " that the interlocutor of the 17th of January 1786 be *reversed.*"

N° CCLXVI. *April* 3. 1787.

LILLIAS BALD,

AGAINST

JANE BUCHANAN.

" *ORDERED*, That the appeal be dismissed, and the interlocutors " complained of be affirmed."

N° CCCXV.

N° CCCXV. *April* 30. 1787.

The Honourable WILLIAM ELPHINSTON,

AGAINST

JOHN CAMPBELL, and others.

" *ORDERED*, That the cauſe be remitted back to the Court of " Seſſion in Scotland, to hear parties farther thereupon, with liberty " to receive ſuch new allegations and evidence as the occaſion may " require."

N° CCLXIV. *March* 12. 1788.

ABRAHAM DELVALLE,

AGAINST

The CREDITORS of the YORK-BUILDINGS COMPANY.

Counſel were called to be heard in this cauſe; and no counſel appearing for the reſpondents, the appellants counſel were heard to ſtate and argue the caſe; and being withdrawn, " *ORDERED*, That the " interlocutors complained of be reverſed, in ſo far as they ſuſtain the " objections to the bonds claimed by the appellants, that the ſame " are not entitled to a place in the ranking, in reſpect they are cut " off by the negative preſcription of the law of Scotland."

N° CCCXLII. *April* 8. 1788.

DAVID DONALD,

AGAINST

ANNE KIRKALDY.

" *ORDERED*, That the appeal be diſmiſſed, and the interlocutors " therein complained of be affirmed."

N° CCCI. *April* 14. 1788.

EDWARD BRUCE,

AGAINST

WALTER ROSS.

" *ORDERED*, That the appeal be diſmiſſed, and the interlocutors " complained of be affirmed."

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OF THE

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ADJUDICATION. An adjudication led, in ſecurity of contingent claims, admitted to rank with others on debts already due. No. 1. *The Creditors of Sir Thomas Wallace-Dunlop contra Brown and Collinſon, Nov.* 14. 1781.

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An adjudication, although reſtricted to a ſecurity, on account of a *pluris petitio*, found ſtill to be the firſt effectual one. No. 11. *Sinclair and Doull againſt the Earl of Caithneſs, Dec.* 8. 1781.

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Act 23d Geo. III. c. 18. A creditor having neglected to make oath as to the verity of his debt, within the *nine* months, excluded from a ſhare of the *firſt* dividend, though this ſhould comprehend the whole effects which belonged to the bankrupt. No. 330. *Humphry againſt Crawford, March* 8. 1787.

BASTARD. Letters of legitimation do not entitle agnates to ſucceed to a baſtard, without a ſpecial proviſion in their favour. No. 145. *Hunter againſt Hunter, Feb.* 10. 1784.

BILL OF EXCHANGE. One to whom a bill of exchange was ſent for acceptance, adhibited his ſubſcription ſimply; but directed the perſon to whom he tranſmitted the bill, not to deliver it to him in whoſe favour it was drawn, but under certain conditions. The Lords found, That although the perſon drawn upon might have refuſed to accept, if he had no value in his hands, he was not intitled to detain the bill for a moment; and therefore found him liable, although the conditions ſtipulated by him had not been fulfilled. No. 5. *Campbell againſt Campbell, Nov.* 21. 1781.

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A factor drawing bills for behoof of his conſtituent, but omitting to ſpecify his character as ſuch in the draughts, found liable in recourſe to the original creditor. No. 50. *Connel againſt Maclelland, July* 5. 1782.

A perſon whoſe ordinary place of reſidence was in Scotland, while occaſionally in London, became indorſee of a bill of exchange, payable there. The bill being afterwards diſhonoured, but no intimation having been made to the indorſer, who had before returned to Scotland, without giving any notice of his addreſs to the indorſees; the Lords found the indorſer not liable. No. 56. *Hodgſon and Donaldſon againſt Buſhby, July* 18. 1782.—— N. B. This deciſion reverſed in the Houſe of Lords. *Vid.* App. Caſes.

The holder of a bill of exchange may receive a partial payment from the acceptor, after proteſting it againſt him for not payment, without liberating the indorſer. No. 73. *Hodgſon and Donaldſon againſt Buſhby, Dec.* 2. 1782.——*Nota*, The final determination of this caſe, in favour of the indorſer, was reverſed in the Houſe of Lords; but it is believed that the principle of the deciſion, of which a ſummary is here given, was not departed from.

A bill granted (by a donor *mortis cauſa*) to a confident perſon, on purpoſe to effectuate his donation by means of that perſon's interpoſing his bill to the donee himſelf, found to be effectual. No. 74. *Adam againſt Johnſtone, Dec.* 2. 1782.

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Although an onerous indorſee of a bill of exchange is not ſubject to any exception ariſing from the fraud of the indorſer; yet if the indorſation has been the reſult of a colluſion between the drawer and indorſee himſelf, the queſtion will be viewed in the ſame light as if no indorſation had been made. No. 226. *Corrie againſt Aitken and others, July* 27. 1785.

Where circumſtances of fraud are relevantly ſtated againſt the holder of a bill of exchange, and a proof offered, it is competent to demand a perſonal examination of the holder before going farther, otherwiſe this cannot be done. No. 227. *Goodfellow againſt Madder, July* 27. 1785.

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The laſt of the days of grace happening to fall on a Sunday, and the bill being proteſted the following day, it was found not duly negotiated. No. 282. *Smith and Payne againſt Laing, Arthur, and Company, June* 29. 1786.

The oath of party reſpecting the onerosity of a bill, required to be ſpecial. No 286. *Swan againſt Swan, June* 30. 1786.

Although the drawing of a bill of exchange imports an aſſignment of thoſe effects of the drawer, which are at the time in the hands of the perſon drawn upon; yet if the party in whoſe

whoſe favour ſuch a draught is made neglect to follow out his right in a proper manner, his claim will be precluded. No. 296. *Hogg againſt Fraſer, Nov.* 29. 1786.

Bills of exchange, ſince the act of 1772, retain their extraordinary privileges for *ſix* years. No. 309. *Robertſon and others againſt Macglaſhan, Feb.* 6. 1787.

A perſon indorſed a bill of exchange in favour of his grandſon, who was at the time under age. He afterwards delivered the bill, with ſeveral other writings, to his eldeſt ſon, who was his general repreſentative, without giving directions as to the diſpoſal of any of them. The Lords, in an action brought by the indorſee againſt the eldeſt ſon, found, That the purſuer had right to the bill. No. 310. *Carrick againſt Key, Feb.* 6. 1787.

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Bills paſs by indorſation as well after proteſt as before. *Ibidem.*

A bill not ſubſcribed by the drawer ſuſtained, in reſpect of its being accepted, and of the creditor's name being ingroſſed in the body of it. App. No. 7. *Drummond againſt Creditors of Drummond, Feb.* 8. 1785.

A bill not ſubſcribed by the drawer ſuſtained, in reſpect of the creditor's name being *in græmio*, and of the drawer's having put his name on the back of it, above which ſignature receipts for partial payments ſtood. App. No. 8. *Hare againſt Geddes, Nov.* 22. 1786.

BONA FIDES,—and ignorance of the commencement of hoſtilities, conſidered as grounds for liberating an enemy's ſhip from capture. No. 14. *W. t'Hart and Claas Jaan en Zoonen againſt Collins and others, Dec.* 14. 1781.

To entitle a party to the privilege of a *bona fide* poſſeſſor, the mere ignorance of a better right is not ſufficient; but the belief of his being the true owner muſt be founded on probable grounds. No. 121. *Blair againſt Bruce-Stewarts, Nov.* 1783.——This judgment affirmed on appeal.

BOROUGH-ROYAL. Preſenting and receiving in council, found not requiſite in order to entitle deacons of crafts to be members of the convenery. No. 58. *Chalmer againſt Town-council of Edinburgh, July* 24. 1782.

A complaint againſt a borough-election may be proſecuted after two kalendar months have elapſed from the ſubſequent election. No. 75. *Marſhall and Dick againſt Carre Dec.* 4. 1782.

The excluſive privileges of the incorporated trades are not confined to the manufacturing of goods within the burgh, but extend to the ſelling of them after they are manufactured. No. 133. *The Bakers of Edinburgh againſt William Dowie, Dec.* 4. 1783.

Non-reſidence is an eſſential objection to the election of any perſon to ſerve in any office within a burgh, unleſs where a contrary rule has been eſtabliſhed with regard to particular officers, by inveterate uſage. No. 203. *Tennent and Gray againſt Johnſton and others, Feb.* 23. 1785.——This deciſion was reverſed on appeal.

The act 24th Geo. II. c. 31. authoriſing the manufacturing of linen, hempen or flaxen cloth, within burghs, independently of all excluſive privileges, does not prevent the corporations from enacting proper by-laws for the regulation of their own members, though employed in theſe branches of trade. No. 211. *The Corporation of Weavers in the Town of Cupar againſt Wilſon and others, June* 18. 1785.

In a queſtion between the Magiſtrates of Glaſgow and ſome of the inhabitants, with regard to the power of impoſing a duty or cuſtom on potatoes brought into the town for ſale, the Lords found, *1mo*, That the Magiſtrates of Glaſgow have a right to eſtabliſh proper market-places within the burgh, and to impoſe and levy ſmall duties on potatoes, or other commodities ſold therein; and, *2do*, That on potatoes ſold in the ſtreets, ſhops, cellars, or elſewhere, within the burgh, the magiſtrates may levy the ſame dues as when they are ſold in the market-place. No. 284. *Ferguſon and others againſt the Magiſtrates of Glaſgow, June* 29. 1786.

The magiſtrates of a royal borough, not withſtanding an immemorial practice, of uſing the property of the community in a particular manner, may alter that practice, if not ſo much for the general good of the inhabitants as a different method of adminiſtration would be. No. 287. *Fram and others againſt the Magiſtrates of Dumbarton, July* 19. 1786.

The fine or compoſition paid by perſons becoming burgeſſes, may be diminiſhed or increaſed by the magiſtrates, according to the exigencies of the community, and the advantages reſulting from the communication of trade. No. 288. *Duncan and others againſt the Magiſtrates of Aberdeen, July* 21. 1786.

See JURISDICTION.

C

CAPTIVE. However invalid or exceptionable a ranſom-contract may be, the owners of the ſhip are ſtill obliged to procure the immediate releaſe of the hoſtage, and to indemnify him for the loſs he has ſuſtained by his detention. No. 149. *Darg againſt Gordon and Company, Feb.* 25. 1784.—The ſame deciſion, No. 219. *Lamont againſt Johnſton, Armſtrong, and Company, July* 2. 1785.

CAUTIONER. A cautioner in a ſuſpenſion is not liable for the debt, where, in conſequence of an action of reduction brought by one not a party to the ſuſpenſion, the charger's right has been ſet aſide; and in this manner the reaſons of ſuſpenſion, which were relevant againſt the charger, have been rendered unavailing. No. 186. *Cowan againſt Marſhall, Dec.* 21. 1784.

A perſon offering to be cautioner in a ſuſpenſion, may, after ſigning a bond for that purpoſe, reſile at any time before his ſecurity has been accepted of by the clerk of the bills. No. 257. *Sir Michael Steuart againſt Mitchell, Feb.* 7. 1786.

CLAUSE. Import of that of "All eſtate, perſonal and real," equivalent to that of "All eſtate, heritable and moveable." No. 53. *Drummond againſt Drummond, July* 17. 1782.

A wife, by her marriage-articles, having diſponed her lands "to herſelf and her huſband, in conjunct fee and liferent, and to the heirs to be lawfully procreated of the ſaid marriage between them, in fee; which failing, to the heirs lawfully procreated of her body in any other marriage; which failing alſo, to the huſband, his heirs and aſſignees whatſoever;" the Lords found the fee to be in the huſband. No. 62. *Blairs againſt Bell and others, Aug.* 5. 1782.

A woman, by her marriage-contract, diſponed the fee of certain lands to her huſband, but reſerved the liferent; with this declaration, That in caſe there were children, one or more, procreated of the marriage, her liferent ſhould be reſtricted to a certain ſum; "the remainder of the rents and profits thereof being to go to the child or children." The huſband afterwards dying in bankrupt circumſtances, the Lords found, "That his children had right to the excreſcence of rents, after paying to their mother the reſtricted ſums; and that theſe rents were not affectable by his creditors." No. 62. *Blairs againſt Bell and others, Aug.* 5. 1782.

A legacy to a wife, "excluſive of the *jus mariti*, and to be held by her, her heirs and aſſignees," devolves to theſe heirs, notwithſtanding her predeceaſing the teſtator. No. 77. *E. of Moray and others againſt Stuart, Dec.* 15. 1782.

The clauſe "heirs whatſoever" interpreted contrary to the deſtination of the more ancient inveſtitures. No. 154. *Roſe againſt Roſe, March* 10. 1784.

That of "failing children," how interpreted. No. 161. *Stevenſon againſt Bar, June* 24. 1784.

See FIAR, PERICULUM.

COMMONTY. In the diviſion of a commonty, the ſole proprietor was found not intitled to a *præcipuum*; but his right was reſerved to coals and other minerals under ground, and to that part of the commonty which ſhould remain after the reſpective ſhares had been allotted to all the parties having intereſt. No. 38. *Henderſon againſt Macgill, Feb.* 21. 1782.

COMMON INTEREST. Action *communi dividundo*. A joint proprietor of an indiviſible ſubject may be compelled to a ſeparation of intereſts by means of ſale. No. 30. *Milligan againſt Barnhill, Feb.* 8. 1782.

COMPENSATION AND RETENTION. A truſtee was found not intitled to retention of the truſt-funds in ſatisfaction of a debt due to himſelf. No. 12. *Cambpell againſt Cambpell, Dec.* 11. 1781.

See BANKRUPT.

COMPETITION. In a competition between the ſingular ſucceſſor of a reverſer intitled to redeem for an eluſory preſtation, and the heir of the nominal fiar, the former was preferred, without poſitive evidence of redemption. No. 80. *E. of Lauderdale againſt E. of Eglinton, Jan.* 22. 1783.

Vide PRESUMPTION.

In a competition between an arreſtment uſed by a creditor of a defunct and an intimated aſſignation by his executor, the arreſter was preferred. No. 8. *Bell againſt Campbell, Nov.* 28. 1781.

In a competition between perſonal creditors, who had poinded the growing crop on lands belonging to and poſſeſſed by their debtor, and a diſponee in ſecurity whoſe right was cloathed with infeftment, the Lords preferred the latter, he having applied for a ſequeſtration before the former had fully completed their diligence, by cutting down and ingathering the crop. No. 89. *Parkers againſt Douglas, Heron and Company, Feb.* 5. 1783.

CONDITION, of not marrying without conſent, adjected to a bond of proviſion, gratuitous ſo far as it anticipated the term of payment, found effectual. No. 6. *Hay againſt Wood, Nov.* 27. 1781.

CONSOLIDATION, of property with ſuperiority, found not to be effected *ipſo jure*, or without reſignation *ad remanentiam*. No. 266. *Bald againſt Buchanan, March* 8. 1786.

CREDITORS OF A DEFUNCT. The act 1661, c. 24. found to apply to ſubjects heritable *deſtinatione*. No. 93. *Mackay againſt Repreſentatives of Mackay, Feb.* 15. 1783.

D

DAMAGE AND INTEREST. Literary property. Act 8th Q. Anne. Large extracts of certain books protected by this ſtatute, having been inſerted by the publiſhers of an univerſal Dictionary into that compilation, they were found liable in the penalties of the ſtatute. No. 216. *Murray and others againſt Macfarquhar and others, June* 25. 1785.

The ſecond term of fourteen years granted to authors by the ſtatute 8th Q. Anne, found, as well as the firſt, to extend to aſſignees. No. 340. *Cadell and others againſt Anderſon and Robertſon, July* 17. 1787.

Additions and alterations, though minute, interſperſed through a new edition of a book, found capable of being protected by the ſtatute. *Ibidem.*

No action on the ſtatute 8th Ann. except for penalties. No. 341. *Payne and Cadell againſt Anderſon and Robertſon, July* 17. 1787.

Whether the *præſumptio juris et de jure* of *ignorance* of an individual's right, eſtabliſhed by the ſtatute, may be admitted in a caſe which in its nature implies *knowledge* of ſuch right. *Ibidem.*

Damages were found due to the publiſhers of a book, from perſons who, in republiſhing the ſame book, had aſſumed in the title-page the names, and other circumſtances diſtinguiſhing theſe firſt publiſhers. *Ibidem.*

DECLINATOR. A judge may not be declined becauſe one of the parties is his nephew-in-law. No. 337. *Erſkine againſt Drummonds, June* 28. 1787.

DELINQUENCY. Expreſſions injurious to the character of an individual uttered by a profeſſor in a univerſity to a few of his pupils in private, found to be a relevant charge of ſcandal. No. 333. *Richardſon againſt Anderſon, June* 13. 1787.

DELIVERY. In a bond granted by a father to his children, delivery is neceſſary to render it effectual in a queſtion with his creditors. But where a bond granted by a debtor imports a liferent only to the creditor, the fee being deviſed to his children, delivery is not neceſſary. No. 81. *The Creditors of Turner againſt his Children, Jan.* 23. 1783.

DIES CEDIT, SED NON VENIT. The ſums due to a miniſter's widow in virtue of the Act 17th Geo. II. cap. 11. veſt in her before the term of payment ſpecified by the ſtatute. No. 106. *Donalſon againſt Hay, June* 17. 1783.

DILIGENCE, preſtable by truſtees in a family-ſettlement, not rigorouſly interpreted. No. 174. *Dalrymple againſt Murray and others, Aug.* 4. 1784.

A writer employed " to follow out ſuch " meaſures as ſhould put his employer on an " equal footing with the other creditors," omitted to adjudge the debtor's lands, being of opinion, that from the extent of the real incumbrances already affecting them, every meaſure of that ſort would be uſeleſs. The others creditors, however, who adjudged, were, by ſeveral unexpected events, enabled, in virtue of their adjudications, to recover about a fourth part of what was owing to them. The Lords found the writer liable in the ſums which the employer would have drawn, if an adjudication had been led; and this becauſe at ſuch a juncture the writer ſhould have acquainted his employer with the circumſtances of the caſe, ſo as to enable him to judge for himſelf. No. 307. *Maſon againſt Thom, Feb.* 4. 1787.

DONATIO MORTIS CAUSA. A ſpecial legacy bequeathed to a perſon likewiſe nominated reſiduary legatee, with deſtination " to heirs " and aſſignees," accrues, by the predeceaſe of the legatee, to theſe heirs, as part of the reſiduary eſtate. No. 77. *E. of Murray againſt Steuart, Dec.* 15. 1782.

DUES. The officers in the court of admiralty, in queſtions of prize, are only intitled to the ordinary dues of court. No. 43. *Margetſon againſt the Procurator-fiſcal and Clerk of the High Court of Admiralty, March* 10. 1782.

E

EXECUTION. An inhibition found null, becauſe the execution did not bear the three oyeſſes, nor the open proclaiming or reading of the letters. No. 24. *Ranking of the Creditors of Jarvieſton, Jan.* 24. 1782.

The citation of a perſon, edictally, as being out of the kingdom, when he was in Scotland, is of no effect. No. 84. *Little againſt the Creditors of Tundergarth, Jan.* 26. 1783.

The execution of inhibition ſuſtained, tho' not mentioning *in gremio*, " Witneſſes to the " premiſſes." No. 137. *Paterſon againſt Thomſon, Jan* 16. 1784.

The execution of a complaint in purſuance of the election-ſtatutes, is not regulated by the formalities requiſite in common law-proceedings; and therefore it is not neceſſary, where one of the perſons complained of is out of the kingdom, to apply to the Court of Seſſion for a warrant to cite him edictally. No. 202. *Tennent and others againſt Johnſton and others Feb.* 23. 1785.

EXECUTOR. See NEAREST IN KIN.
See SERVICE AND CONFIRMATION.
See COMPETITION.

EXERCITOR. A purchaſer from a ſhipmaſter of a cargo which the purchaſer knew had not arrived at the place of its deſtination, found liable to the owners in damages. No. 125. *Richardſon and Company againſt Stoner, Hunter, and Ker, Nov.* 20. 1783.

EXHIBITION. The Crown's donatary to chaplain-duties found intitled to production of the title-deeds of the lands liable to the duties. No. 10. *Roſe againſt Grant and others, Dec.* 5. 1781.

As the defender, in an action of exhibition, is not obliged to ſwear, in general, as to his poſſeſſing deeds of a certain effect or quality; ſo where particular writings are called for, it is not competent for him to refuſe exhibition, on the ground, That the deeds in his poſſeſſion are of ſuch a nature, as would not in the leaſt benefit the purſuer in the diſpute in which their production is required. No. 118. *Lady Mary Campbell againſt the Earl of Crawfurd, Aug.* 8. 1783.

EXHIBITION *ad diliberandum*. In this action, when brought by an heir-male againſt the heir of line, it is not neceſſary for the purſuer to produce, or even to condeſcend on, any writing deviſing the predeceſſor's eſtate to heirs-male. No. 300. *Adair againſt Adairs, Jan.* 19. 1787.

EXPENCES. Though the Court of Seſſion be in uſe to grant decreets, in a ſummary manner, for the ſums awarded in name of expences, in the Houſe of Lords, where the matters in diſpute have been finally determined in that high court, they will not do ſo where an appeal has been allowed to be withdrawn on payment of coſts. Here the remedy is, to apply for a diſcuſſion of the appeal. No. 169. *Brown, petitioner, July* 20. 1784.

F

FACTOR. A factor appointed by the Court of Seſſion, in virtue of the act of ſederunt 1736, may make up inventories under the act 1695, c. 24. No. 224. *Paton, petitioner, July* 24. 1785.

A factor who had received a ſubject from his conſtituent, which was certified to belong to another perſon, and to be free from any claim of retention, was nevertheleſs found to be accountable to the conſtituent, and not to the owner. No. 251. *Wilſon, Gregory, and Company, againſt Old, Jan.* 27. 1786.

See PERICULUM.

FACULTY. A diſpoſition in favour of one perſon, under reſervation to another of a power to burden and diſpone, conſiſtent in law. No. 192. *Anderſon againſt Young and Trotter, Dec.* 24. 1784.

FEU. Notwithſtanding the acts 1457, c. 71. and 1503, c. 91. authoriſing ſubinfeudation, the ſuperior is intitled to purſue a declarator of non-entry againſt his immediate vaſſal, to the full rents and profits of the lands before entry,

and

and after it to the duties payable to him by his immediate vaſſal. No. 32. *Coltart againſt Tait and his Tenants, Feb.* 15. 1782.

FIAR. A perſon having ſold his land, took a bond for the price, in which the purchaſer became bound to pay the intereſt thereof to the ſeller during his lifetime, and after his death to pay the principal ſum to the ſeller's children, *nominatim*, and their reſpective heirs. In the event of the death of the children, the bond farther provided, that the ſums due to them ſhould be exigible by two of their relations, for behoof of their iſſue. The Lords found, That the fee was in the children. No. 81. *The Creditors of Turner againſt his Children, Jan.* 23. 1783.

A legacy being bequeathed "to a mother and her children, begotten or to be begotten," the abſolute fee thereof was found to be veſted in the mother. No. 283. *Mure againſt Mure, June* 29. 1786.

See CLAUSE.

FOREIGN. Contracts executed in a foreign country, according to the ſolemnities there required, actionable in Scotland. No. 85. *Ranking of the Creditors of the York-buildings Company, Jan.* 31. 1783.

The Engliſh vicennial limitation of bonds, pleadable againſt a bonded debt contracted in England, when ſued for in Scotland. No. 86. *Ranking of the Creditors of the York-buildings Company, Jan.* 31. 1783.

A creditor in an Engliſh penal bond having adjudged his debtor's lands in Scotland, is intitled to intereſt on the ſums due after the date of the adjudication, but not before it, though the bond has been due more than twenty years. No. 87. 88. *Ranking of the Creditors of the York-buildings Company, Jan.* 31. 1783.

The privilege in favour of the furniſhers of medicines to perſons on deathbed does not extend to the caſe of Scotſmen receiving ſuch aſſiſtance while out of the kingdom. No. 146. *Lawſon and others againſt Maxwell, Feb.* 12. 1784.

FORUM COMPETENS. *Mutua reconventio.* In a proceſs of reduction improbation, the Lords found the defender not obliged to produce in Scotland a latter will executed in England, and which had been proved in one of the prerogative courts there; though the defender was a native of Scotland, where ſhe poſſeſſed a conſiderable eſtate, and was then, in a ſeparate action, inſiſting againſt the purſuer, in Scotland, for payment of ſums due to her by the perſon by whom the latter-will had been executed. No. 71. *Roſs againſt Roſs, Nov.* 26. 1782.

FRAUD. A ſale made to a merchant inſolvent, and againſt whom ultimate diligence, from which he had formerly ſought protection in a ſanctuary, was ſtill ſtanding undiſcharged, found not to be reducible on the head of fraud. No. 183. *Gordon againſt Gardener, Dec.* 15. 1784.

Though frauds committed in the matter of covenants may be redreſſed in equity, by undoing what has been wrongfully done, or by enforcing agreements according to the true meaning of the injured party; yet it is out of the power of courts of equity to ſubſtitute in the place of an agreement actually made, another eſſentially different; and therefore, where a woman poſſeſſed of a conſiderable income had been fraudulently induced to marry a bankrupt, in expectation of large ſettlements from him, but without any expreſs agreement as to excluding his *jus mariti*, the Lords found, That the creditors of the huſband were not barred from attaching the wife's income, as falling under the *jus mariti* of the huſband. No. 212. *Liſk and her curator* ad litem *againſt her Huſband and his Creditors, June* 21. 1785.

Where a perſon purchaſes goods without any intention to pay the price, the party injured may reclaim his property, though delivered more than three days before the public bankruptcy; this limitation only relating to caſes where the preſumption of fraud is founded on the circumſtance of inſolvency alone, and not to thoſe where actual fraud is proved to have given riſe to the tranſaction. No. 278. *Sandeman and Company againſt the Creditors of Kempt, June* 24. 1786.

Where a perſon was induced to ſell his goods to another, in conſequence of a fictitious letter of credit, the Lords found, That the property was not transferred. No. 279. *Love againſt the Creditors of Kempt, June* 24. 1786.

G

GAME. See PUBLIC POLICE.

GENERAL DISCHARGE. A daughter, in her marriage-contract, having accepted of the tocher given by her father, "in full contentation and ſatisfaction of all bairns part of gear, portion natural, legitim, or others whatſoever, that ſhe could aſk, claim, or crave, by and through her father's deceaſe," the Lords found, That this did not exclude her from claiming a proportional ſhare of her father's executry or dead's part. No. 214. *Hepburn againſt Hepburn, June* 24. 1785.

GLEBE. A miniſter, whoſe glebe is contiguous to the ſea-ſhore, has no right to the ſea-ware; this continuing to belong to the proprietor of the lands of which the glebe was originally a part. No. 2. *Lord Reay againſt Falconer, Nov.* 14. 1781.

Grounds which are liable to be overflowed at certain ſeaſons of the year, or ſuch as are in ſome reſpects inconvenient for paſture, may, notwithſtanding, be allocated for graſs to the miniſter, if not in uſe to be cultivated with the plough. No. 159. *The Heritors of the Kirk-lands in the pariſh of Peebles againſt Dalgleiſh, June* 23. 1784.

GROUNDS AND WARRANTS. Diſconformity in the warrants of adjudication appearing on production, after twenty years from their dates, found not to be challengeable. No. 20. *Lane and others againſt Campbell, Jan.* 17. 1782.

H

HEIR-APPARENT. Though the anceſtor die in the moſt diſtant parts, no addition is to be made to the *annus deliberandi*, on account of the

the time elapſing between the death and the notice of it obtained by the heir. No. 120. *Henderſon againſt Campbell, Nov.* 14. 1783.

Inhibition uſed againſt an intermediate apparent heir, found to be of no effect after the ſucceſſion is taken up by a ſubſequent heir ſerving to the predeceſſor laſt infeft. No. 292. *Sutherland againſt Sutherland, Aug.* 4. 1786.

HEIR AND EXECUTOR. In an action of relief brought by the heir of conqueſt by the law of Scotland, who had been obliged to pay a debt due by the anceſtor, againſt the heir-general by the law of Jamaica, in which iſland the anceſtor had a valuable eſtate, it was pleaded for the defender, That by the law of Scotland he was not heir to the deceaſed, being the eldeſt brother, and the deceaſed having others immediately younger than himſelf; while by the law of Jamaica, if that were to be the rule, he would be intitled to the whole ſucceſſion. The Lords found, That as of all thoſe who enjoyed any part of the predeceſſor's eſtate, the defender was alone intitled to the character of heir-general, ſo every burden not immediately affecting the eſtate falling to the heirs of a particular order, could be impoſed on him only. No. 67. *Brown againſt Brown, Nov.* 19. 1782.

An heir-male found intitled to relief, from the heir of line, of heritable debts ſecured on the ſucceſſion of both indiſcriminately. No. 247. *Roſe againſt Roſe. Jan.* 17. 1786.——Reverſed on appeal. See App. Caſes.

HERITABLE AND MOVEABLE. It was found, That window-frames, doors, and the like, brought into a houſe when a-building, but not yet fixed to their proper places, fell under the heritable ſucceſſion. No. 98. *Johnſton and others againſt Dobie, Feb.* 25. 1783.

The annualrents due on a decreet of adjudication deſcend to the heir, and not to the executor of the adjudger. No. 245. *Baikie againſt Sinclair, Jan.* 16. 1786.——Affirmed on appeal. See App. Caſes.

HOMOLOGATION. A minor, who had granted bills along with his father, having, fourteen days after majority, ſubſcribed the docket of an account of which theſe bills were articles, this was found not to be a ſufficient act of homologation. No. 51. *Melvil againſt Arnot, July* 5. 1782.

HUSBAND AND WIFE. The ſums due to the children of the clergy, &c. in Scotland, in virtue of the act 17th Geo. II. c. 11. fall under the *jus mariti* of the huſbands of ſuch of them as are married. No. 106. *Donaldſon againſt Hay, June* 17. 1783.

A debt contracted for the benefit of the ſeparate eſtate of a married woman, though of ſuch a nature that the huſband was bound to diſcharge it, is ſtill effectual againſt her heirs in that eſtate. No. 232. *Nairne againſt Mercer, Nov.* 17. 1785.

Where the eſtate belonging to a wife is ſuch as does not fall under her huſband's *jus mariti*, though its annual produce is ſubject to his adminiſtration, the wife is intitled to a moderate aliment out of it, even in a queſtion with his creditors. No. 236. *Liſk and her Curitor* ad litem *againſt her Huſband and his Creditors, Nov.* 22. 1785.

See ALIMENT.

HYPOTHEC. A landlord may, *currente termino*, not only ſequeſtrate, but likewiſe roup, the hypothecated effects of his tenant, if inſolvent. No. 162. *Dow againſt Hay, June* 25. 1784.

A tenant having ſubſet the lands in virtue of a ſpecial authority aontained in his leaſe, and having for ſeveral years received the rents from the ſubtenants, without challenge on the part of the landlord, it was found, That the effects of the ſubtackſmen, who, *bona fide*, and after the term of payment ſpecified in the principal leaſe, had delivered the ſubrents to the principal leſſee, were not ſubject to the landlord's claim of hypothec. No. 206. *Blane againſt Moriſon and others, March* 8. 1785.

A landlord found intitled to obtain a warrant for rouping the ſequeſtrated effects of his tenant *currente termino* App. No. 3. *Grant againſt Sherris, March* 10. 1784.

I

IMPLIED CONDITION. A legacy having been left "to a perſon, to be paid when he ari-"ved at the age of ſixteen," it was found, That this did not import a condition, but merely a delay of the term of payment, and therefore, that the legatee, having ſurvived the teſtator, tranſmitted the right to his neareſt in kin, the legacy being exigible at the time when, if in life, he would have attained his ſixteenth year. No. 135. *Burnets againſt Sir William Forbes, Dec.* 9. 1783.

IMPLIED DISCHARGE. A woman having, in a poſtnuptial contract of marriage, in caſe of her huſband's predeceaſe, accepted a liferent of all her huſband's effects, heritable and moveable; and having alſo, in the event of her predeceaſe, aſſigned to him her ſhare of the goods in communion, under certain limitations; the Lords, in a queſtion between the executors of the huſband, who predeceaſed, and thoſe of the wife, found, That the *jus relictæ* had been virtually excluded. No. 9. *Riddel againſt Dalton, Nov.* 28. 1781.

IMPLIED OBLIGATION. Where a perſon has granted a perſonal obligation relative to land, he may be compelled to complete it in ſuch a manner as to render it effectual againſt the eſtate; and therefore, where a vaſſal had obliged himſelf, "That whenever he or his heirs "ſhould think fit to diſpoſe of the ſubject, "they ſhould offer it to the ſuperior, or his "heirs, for a certain ſum," the Lords found, That the heir of the vaſſal making up titles to the lands, was obliged to inſert the obligation above mentioned in the inveſtitures, ſo as to render it a real burden on the lands. No. 15. *Sir Charles Preſton againſt the Earl of Dundonald, Dec.* 20. 1781.

IMPRESS OFFICER. It was found, That by act 13th Geo. II. c. 17. a ſhip-carpenter, equally with any landſman, is exempted from being impreſſed for two years after he goes to ſea. It was alſo found, That a protection granted by the Lords of the Admiralty was not the only

only mode of aſcertaining a party's right to the ſtatutory exemption. No. 28. *Chalmers againſt Napier, Feb.* 6. 1782.

Though the circumſtance of carrying on an illicit trade has been found to deprive a party of his immunity from being impreſſed; yet ſingle acts of ſmuggling will not be ſufficient for that purpoſe; nor, in a caſe where a party accuſed of ſmuggling has been acquitted in the Court of Exchequer, will it be competent for the officer employed in the impreſs-ſervice to offer a proof that the party impreſſed had been actually guilty of that offence. No. 29. *Brodie, Ellis, and Herd againſt Napier, Feb.* 6. 1782.

INDEFINITE PAYMENT. A creditor of a bankrupt, after making a purchaſe at the ſale of his debtor's effects, and granting bond along with a cautioner for the price, with *proviſo*, That his dividend ſhould be allowed out of this while in his hands, became, at a conſiderable diſtance of time, alſo bankrupt; and the queſtion occurring, Whether the dividend ought to be allotted out of the principal ſum and the annualrents that fell due during the ſeven years after the date of the bond, for which the cautioner was liable, by which means he would be relieved; or in what other manner; it was found, "That the dividend "was to be applied in extinction of the an-"nualrents before the principal, and of the "annualrents falling firſt due, before the po-"ſterior annualrents." No. 26. *Creditors of Geils againſt Maxwell, Jan.* 29. 1782.

INFEFTMENT. An heritable office pertaining to the King's houſehold, found to be tranſmiſſible by baſe infeftment. No. 21. *Stewart againſt Campbell, Jan.* 17. 1782.

An adjudger from one whoſe right was only perſonal, conſiſting of a diſpoſition containing a procuratory of reſignation which had never been executed, cannot, even in a burgal tenement, take infeftment on his decreet of adjudication, but muſt either recover the procuratory itſelf, and in virtue of it, and of the adjudication, make reſignation in the ordinary form, or in conſequence of the perſonal right veſted in him by the adjudication, obtain an adjudication in implement againſt the author laſt infeft. No. 41. *Marſhall and Ruthven againſt Wight, March* 1. 1781.

INHIBITION, found to ſtrike againſt a bond of corroboration granted to the heir of a creditor, as ſerving to create a title in the room of confirmation. No. 45. *Watſon againſt Marſhall and others, June* 19. 1782.

How far it extends to ſubjects heritable *deſtinatione*. No. 93. *Mackay againſt Repreſentatives of Mackay, Feb.* 15. 1783.

Strikes not againſt bills, though poſterior, if granted in the place of ſuch as were prior to it. No. 223. *Douglas, Heron, and Company, againſt Brown, July* 24. 1785.

Not competent to render effectual againſt creditors, a deed, by which a perſon obliges himſelf, in favour of others, not to ſell or impignorate his lands, nor to contract debt whereby they may be burdened. No. 347. *Saunders againſt Lord Ankerville and others, Aug.* 8. 1787.

See EXECUTOR.

See HEIR-APPARENT.

INNOVATION. The acceptance of a new real ſecurity, without renunciation, found not to innovate the prior one. No. 205. *Rutherford againſt Anderſon, Feb.* 25. 1785.

See INHIBITION.

INSURANCE. See PERICULUM.

IRRITANCY. A perſon having, in purchaſing a houſe, become bound, either to pay or give ſecurity for the price, at a certain term, or to be held as a tenant at a rent conſiderably exceeding what the purchaſer could expect from any other perſon; the Lords did not conſider this as a penal irritancy, the conſequences of which might be done away at any time before a decreet of irritancy had been extracted; and therefore, the purchaſer having failed to implement the conditions of the bargain, they found, That he was to be deemed the tenant, and not the proprietor of the houſe. No. 207. *Young againſt Dun, March* 9. 1785.

JURISDICTION. The purſuer of a proceſs of defamation and damages againſt one of the members of a preſbytery, complained to the Court of Seſſion, before which the action depended, that the preſbytery had pronounced a ſentence againſt him, excluding him from the benefit of church-privileges until he renounced his proceſs. The Lords diſmiſſed the complaint as incompetent. No. 17. *Macqueen and Spouſe, petitioners, Dec.* 21. 1781.

An action of damages founded on an acquittal in the Court of Juſticiary, not competent before the Court of Seſſion. No. 35. *Gemmil againſt Walkinſhaw-Crawford, Feb.* 20. 1782.

The juriſdiction of the Court of Seſſion interpoſed to regulate the firlot meaſure given out by the town of Linlithgow. No. 52. *Finlay and others againſt Magiſtrates of Linlithgow and Bakers of Edinburgh, July* 21. 1782.

Juſtices of the peace found not to have the power of ſhutting up one of two public roads, though that which was left was the moſt convenient, and ſufficient to anſwer the purpoſes of both. No. 63. *Napier and others againſt Robiſon and others, Aug.* 7. 1782.

The juriſdiction of the Court of Seſſion, in the firſt inſtance, ſuſtained in a queſtion between a mariner and his apprentice, relative to their contract. No. 90. *Kinnear againſt Peter, Feb.* 5. 1783.

Juriſdiction of the Court of Seſſion interpoſed in changing the hour and other circumſtances of the public market of a royal borough, in oppoſition to the regulations before eſtabliſhed by the council of the borough. No. 102. *Paterſon and others againſt Magiſtrates and Town-Council of Stirling, and Corporation of Weavers in that Borough, Feb.* 28. 1783.

Action on a policy of inſurance found not to be competent before the Court of Seſſion in

the firſt inſtance. No. 119. *Clark againſt Robertſon and others, Aug.* 8. 1783.

Although a pariſh-miniſter, having refuſed tokens of admiſſion to the ſacrament of the Lord's Supper, is not amenable, though he had acted maliciouſly and injuriouſly, to the civil courts of law; yet where he has, in private companies, or on occaſions no wiſe connected with his ſacred function, imputed crimes to his pariſhioners as the cauſe of his refuſing them admiſſion to church-privileges, this is actionable. No. 127. *Macqueen and Spouſe againſt the Reverend Mr John Grant, Nov.* 21. 1783.

In a petition to the Court of Seſſion, the ſheriff-clerks in the different counties in Scotland ſet forth, That the fees due to them were in many inſtances evaded, and that in others they were too ſmall, or altogether unfixed; and therefore prayed the Court, to eſtabliſh, by a general regulation, the fees which ſhould be exacted. The Lords diſmiſſed the petition as incompetent. To give redreſs in particular inſtances, where a regulation of the fees had been altogether omitted, or where thoſe already ſettled had been evaded, might be within the powers of the Court; but to eſtabliſh a general ſet of regulations in this matter, was the prerogative of Parliament. No. 136. *The Sheriff-Clerks, petitioners, Dec.* 9. 1783.

The Lords found, That by long uſage, approved by deciſions of the Court of Seſſion, action upon inland bills, as well as upon foreign bills of exchange, has been rendered competent before the Judge of the High Court of Admiralty. No. 160. *Gordon againſt Bogle, June* 23. 1784.

A ſentence of a church-court, affecting a party's civil concerns, though riſing incidentally out of a matter of eccleſiaſtical cogniſance, ſubject to review by the civil juriſdiction. No. 233. *Rutherford againſt Preſbytery of Kirkaldy, Nov.* 17. 1785.

Criminal acts ſubject to the cogniſance of civil courts *ad civilem effectum*. No. 243. *Leſlie againſt Mackenzie, Dec.* 9. 1785.

An action of damages, at the inſtance of a huſband, againſt a perſon accuſed of adultery with his wife, found competent, prior to divorce. No. 328. *Maxwell-Campbell againſt Montgomery, March* 7. 1786.

An appeal to the Houſe of Lords is competent from the judgments of the Court of Seſſion, ſitting as Commiſſioners of Tithes. App. No. 2. *The Miniſter of Kirkden againſt the Heritors, July* 8. 1784.

See STIPEND.

K

KIRK. In a queſtion with regard to the building of a church in a pariſh, which was partly compoſed of a burgh of regality, partly of a ſmall village contiguous to the former, and partly of a landward diſtrict, the Lords found, That the valued rent could not be the rule of apportioning the whole expence; but that ſo much of it as was neceſſary for accommodating the inhabitants of the landward diſtrict, ſhould be defrayed according to that rule, while the remainder was to be defrayed by the feuers and proprietors of houſes, according to the real rents of their properties; and that the area of the church, after it was built, was to be divided in the ſame manner. No. 4. *The Feuers and Heads of Families in the Town of Crieff againſt the Heritors of the Pariſh of Crieff, Nov.* 20. 1781.

The diviſion of the area of a church preſumed from long poſſeſſion. No. 240. *Cathcart and others, againſt Weir and others, Nov.* 24. 1785.

The Lords found, That a pariſh-church ought to be of dimenſions ſufficient to contain two thirds of the examinable perſons in the pariſh, not under twelve years of age. No. 335. *The Miniſter of the Pariſh of Tingwall againſt the Heritors, June* 22. 1787.

KIRK-SESSION. It is only in virtue of an excluſive, as well as immemorial poſſeſſion, that a kirk-ſeſſion can acquire the privilege of keeping mort-cloths for hire. No. 94. *The Kirk-Seſſion of Dumfries againſt the Corporation of Squaremen in that Town, Feb.* 18. 1783.

L

LEGACY. A teſtator having provided, that a ſum of money due to him ſhould be equally divided between two brothers, the Lords found, That the *jus accreſcendi* did not here take place; and therefore, one of the legatees having predeceaſed the teſtator, the neareſt in kin of the latter were found preferable to the co-legatee. No. 18. *Roſe againſt Roſes, Jan.* 15. 1782.

LEGITIM. A claim under a father's total ſettlement, found to be incompatible with that of legitim. No. 59. *Henderſon againſt Henderſon, July* 26. 1782.

LITIGIOUS. The preference of adjudications led during the dependence of a proceſs of ranking and ſale, found not to be affected by that circumſtance. No. 221. *Maſſey and others againſt Smith, July* 12. 1785.

Land-rights, not rendered litigious by the mere execution of a ſummons. No. 331. *Moriſon and Co. againſt Allardes, March* 8. 1787.

M

MANSE. A miniſter of a pariſh, partly landward, and partly conſiſting of a royal borough, found not intitled to demand the building of a manſe, but to claim a ſum of money for houſe-rent. No. 156. *Mutter againſt E. of Selkirk, June* 16. 1784.

A manſe may be declared ſufficient in terms of the act 1663, though built voluntarily by the heritors, without any interference of the preſbytery. No. 261. *The Heritors of the Pariſh of Cairney againſt the Moderator and other Members of the Preſbytery of Strathbogie, Feb.* 21. 1786.

MEDITATIO FUGÆ. In obtaining a warrant of incarceration on this ground, it is not neceſſary to produce evidence of the debt; but the party applying muſt ſwear to the exiſtence of his

his claim. Neither is it neceſſary for the party applying to ſwear, That the alleged debtor is about to fly, on account of the particular claim. It is ſufficient that he is about to leave the kingdom. No. 27. *Wright againſt Gammel, Feb.* 6. 1782.

A warrant for incarcerating a debtor as *in meditatione fugæ* may be put in execution on a Sunday. No. 246. *Kempt againſt his Creditors, Jan.* 16. 1786.

Or within the limits of the ſanctuary. No. 311. *Park and Brown againſt Bennet, Feb.* 10. 1787.

MEMBER OF PARLIAMENT. An apparent heir demanding an inrolment as a freeholder muſt lodge his claim in the ſame manner as any other claimant, two months before the Michaelmas meeting. No. 82. *Mackenzie againſt Monro, Jan.* 25. 1783.

A huſband, during the lifetime of his wife, has right to vote in virtue of her infeftment, though ſhe be not an heireſs. No. 250. *Skene againſt Sandilands, Jan.* 25. 1786.

A truſt-conveyance for the behoof of creditors does not take away the granter's right of voting at the election of a member of Parliament. No. 271. *Donaldſon and others againſt Sir Lndovick Grant, March* 11. 1786.

The name of a perſon inrolled as a freeholder in right of his wife, during her lifetime, having been ordered by the freeholders to be expunged after her death, it appearing from her inveſtitures produced, that ſhe was only a ſingular ſucceſſor; he was afterwards allowed to produce in the Court of Seſſion evidence, by a deed of ſettlement, that, his wife being an heireſs of proviſion, he had a right, as tenant by the courteſy, to continue on the roll. No. 289. *Erſkine-Knight againſt Robinſon, July* 26. 1786.

A freehold-qualification found to be nominal and fictitious, the freeholder having ſubſcribed a deed, in which it was acknowledged, that the conveyance in his favour was no deterioration of the eſtate of the granter, but, on the contrary, might tend to encreaſe the political influence of his family. No. 313. *Macdowal againſt Buchanan, Feb.* 20. 1787.

The ſame deciſion,—with regard to another qualification, derived from the ſame perſon, and differing from the one in the preceding caſe only in this, that the freeholder had not ſubſcribed the writing. But its contents were well known to him. No. 314. *Macdowal againſt Buchanan, Feb.* 20. 1787.

The ſame deciſion,—where the feudal titles exhibited for the claimant imported only a bare liferent of the ſuperiority, derived from the proprietor of an eſtate ſtrictly entailed. No. 315. *Campbell and Tod againſt Elphinſtone, Feb.* 20. 1787.

The ſame deciſion,—where the right conveyed to the claimant was a liferent of ſuperiority, yielding a very inſignificant feu-duty, no wiſe adequate to the expence incurred in making out the neceſſary writings; and the caſualties of ſuperiority were taxed at double the feu-duty. No. 316. *Campbell and others againſt Ingram, Feb.* 20. 1787.

The objection of *nominality* over-ruled, where the right of the voter was a fee of the ſuperiority, to return, at the death of the fiar, to the eldeſt ſon of the granter, and with the exception of the liferent, which had been previouſly conveyed away to another. No. 317. *Scott and Tod againſt Millar, Feb.* 20. 1787.

The ſame deciſion,—where the claim to be inrolled was founded on a liferent of ſuperiority, which had been originally ſeparated from the property, without any political purpoſe. No. 318. *Lamont and Campbell againſt Alſton jun. Feb.* 20. 1787.

The ſame deciſion,—the right of the claimant being a liferent of ſuperiority. The feuduties were conſiderable, and the cauſualties of ſuperiorty were not taxed. No. 319. *Roebuck againſt Sir William Cunningham and others, Feb.* 20. 1787.

A freeholder conveyed away the lands in virtue of which he had been inrolled, by a diſpoſition, containing a procuratory of reſignation, and a precept of ſeiſin; and the diſponee took infeftment in virtue of the precept. But on the day immediately preceding the election, the diſponee reſigned the lands *ad remanentiam*, in the hands of the diſponer; and the inſtrument of reſignation was immediately recorded. It was objected to the freeholder's continuing on the roll, that the eſtate having been clearly reſerved in him for the purpoſe of giving him a right to vote, was thus in defraud of the laws relating to elections. The Lords repelled the objection. No. 320. *Macdowal againſt Crawford, Feb.* 20. 1787.

Objection to a retour, appealed to by a claimant in evidence of the old extent of his lands, that it only related to the half of a tenement, which, however, it deſcribed to be the whole and equal half of a L. 26, 4 s. land, as not proving that the other half was preciſely of the ſame value, ſuſtained. No. 321. *Macdowal againſt Buchanan, Feb.* 25. 1787.

Objection to a retour, that the lands had been valued along with the offices of *coroner* and *mair* of fee, which were now in diſuſe, and could not, at any rate, give a freehold-qualification, over-ruled: *1ſt*, Becauſe no value had been put on theſe offices, as appeared from the total amount of the ſums in the *valent*, agreeing with the value of the other articles as ſpecified in the *deſcriptive* clauſe; and, *2dly*, Becauſe, by another retour, which, tho' not referred to in the claim, had been produced in the court of freeholders, it had been certified, *quod dicta officia coronatoris et maris feodi nunc valent per annum debito exercendo ſui ſervitii et tantum valuerunt tempore pacis.* No. 317. *Scott and Tod againſt Millar, Feb.* 20. 1787.

An objection to a decreet of diviſion of the valued rent, pronounced at a meeting held in conſequence of an adjournment made at a previous meeting, where, of five commiſſioners preſent, only one had taken the oaths, over-ruled. No. 322. *Campbell againſt Macdowal, Feb.* 20. 1787.

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An objection to a decreet of diviſion of the valued rent, that in apportioning the land-tax among ſeveral different parcels of land, the commiſſioners had put a higher rate on ſome of them than had been done in the general valuation of the county where theſe parcels had been ſeparately valued, ſuſtained. No. 323. *Cunninghame againſt Sir William Maxwell, Feb.* 20. 1787.

MINISTER. See HUSBAND AND WIFE, and DIES CEDIT ET NON VENIT.

MINOR. The Court refuſed to authoriſe a debtor to pay the debt to a minor not having curators, No. 60. *Kirkman againſt Pym, Aug.* 1. 1782.

A young gentleman, fifteen years old, and an officer in the army, became indebted to a toyman for the price of certain articles, the greater part of which, though not eſſentially or indiſpenſably neceſſary, were, however, of ſuch a ſort as are uſually poſſeſſed by young perſons of the ſame rank. He afterwards granted a bill of exchange for the debt, on which diligence followed, for attaching two horſes which belonged to him. The Lords, in a ſuſpenſion, found, That although ſuch furniſhings as thoſe in queſtion could not have produced action againſt the perſons obliged by law to aliment the minor, they were yet, to the effect of attaching his proper eſtate, the foundation of a valid claim. No. 69. *Johnſton againſt the Hon. William-Mordaunt Maitland, and the E. of Lauderdale, his adminiſtrator-in-law, Nov.* 20. 1782.

Furniſhings made to a minor, even when reſiding at a diſtance from his guardian, without inquiring whether he was ſufficiently ſupplied by thoſe who had the charge of him, are not, unleſs ſo far as they are proved to have been uſefully employed, the foundation of an action againſt the minor. No. 115. *Scoffier againſt Read and his adminiſtrator-in-law, July* 26. 1783.

See HOMOLOGATION.

MOVEABLES. The property of moveables not transferred on ſale, even after delivery of ſamples. No. 196. *Hill againſt Buchanans, Jan.* 26. 1785.——Affirmed on appeal. *Vid.* App. Caſes.

The ſeller, after delivery, getting the goods again *bona fide* into his poſſeſſion, may, if the purchaſer becomes bankrupt, retain them till payment of the price. *Ibidem.*

A perſon having received the price of ſome grain, and having afterwards informed the purchaſer, that the ſtipulated quantity had been ſet apart for him, became publicly bankrupt before any farther delivery. In a queſtion between the purchaſer, claiming the grain thus ſet apart as his property, and the factor on the ſequeſtrated eſtate, the Lords found, That the property had not been transferred. No. 256. *Salter againſt the Factor on the ſequeſtrated eſtate of Knox and Company, Feb.* 7. 1786.

A perſon having undertaken to build a ſhip for another, the price being to be paid in certain portions, as the work advanced, became bankrupt, after receiving payment of the firſt portion. In a queſtion between the employer and the factor on the builder's ſequeſtrated eſtate, the Lords found the claim of the former to be preferable to that of the latter. No. 290. *Simpſon againſt the Creditors of Duncanſon, Aug.* 2. 1786.

Delivery *brevis manus.* Property of goods on ſhip-board transferred upon ſale by the indorſation of the bills of lading. No. 305. *Bogle againſt Dunmore and Company, Feb.* 2. 1787.——Affirmed on appeal. *Vid.* App. Caſes.

MUTUAL CONTRACT. A literary work having been announced in propoſals for publiſhing by ſubſcription, as conſiſting of different parts, the ſubſcribers were found to be freed from their engagements, in conſequence of ſome of thoſe not being executed. No. 263. *Shaw againſt Macdonell and others, March* 3. 1786.

Where a huſband, in his marriage-articles, becomes bound to employ the money aſſigned to him by the wife, in ſecurity of her jointure, ſhe is entitled, while the ſums ſo aſſigned are yet *in medio*, and even in a queſtion with his creditors, to inſiſt that they ſhall be preſerved entire, ſo as to ſecure the proviſions promiſed to her. No. 327. *Buchanan and her Truſtee againſt Speirs and Bogle, March* 6. 1787.

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NAUTÆ CAUPONES ET STABULARII. The owners of ſtage-coaches are not reſponſible for the conveyance of money delivered to their ſervants as an ordinary parcel. No. 308. *Macauſland againſt Dick and others, Feb.* 6. 1787.

NEAREST IN KIN. See SERVICE AND CONFIRMATION.

Poſſeſſion of the defunct's moveables by the neareſt of kin veſts him in the rights of thoſe ſubjects only which have been ſo poſſeſſed. No. 164. *Macdowall againſt Macdowall, June* 29. 1784.

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OATH OF PARTY. See PROOF.

See BILL OF EXCHANGE.

OBLIGATION. A bond granted by a father to his daughter, as unmarried, when without his knowledge ſhe was married, not invalid on that account. No. 6. *Hay againſt Wood, Nov.* 27. 1781.

P

PACTUM ILLICITUM. The intended offerers at a public ſale, inſtead of allowing the price to be enhanced by their competition, having agreed to ſhare among themſelves that ſum by which they would otherwiſe have raiſed it beyond the upſet price. The Court found the combination unlawful, and the purchaſer liable for the higheſt price which it appeared their competition would have produced. No. 104. *Murray againſt Macwhan, March* 1. 1783.

A Britiſh ſubject, priſoner on board of a French privateer while ſhe captured a Britiſh ſhip, having purchaſed the prize *bona fide* on his own account, was found not to have thus acquired the property. No. 140. *Palmer againſt Hutton, Feb.* 3. 1784.

If a perſon ſtipulates a benefit to himſelf, or

to

to another, for obtaining for a third an office from government, this deemed a *pactum illicitum*. No. 252. *Dalrymple againſt Shaw, Feb.* 1. 1786.

Whether an office may be lawfully procured to one perſon for the behoof of another, by agreement between them? *Ibidem.*

The payment by one political party in a burgh, of an elector's debts, in order to counteract the deſigns of the oppoſite party, who had inſtigated the creditor to the execution of ultimate diligence, not conſtrued as bribery and corruption. No. 259. *Morries and others againſt Wilſon and others, Feb.* 16. 1786.

An agreement between a perſon guilty of fornication and the kirk-treaſurer of the pariſh in which he reſided, whereby the former became bound to pay to the latter a certain ſum, for behoof of the poor, in order to free himſelf, not only from a proſecution on the act 1661, before the juſtices of the peace, but alſo from an eccleſiaſtical inquiry into his conduct, found to be actionable. No. 291. *Grant againſt Davidſon, Aug.* 2. 1786.

A wager reſpecting the election of a member of parliament, not actionable. No. 301. *Bruce againſt Roſs, Jan.* 26. 1787.——Affirmed on appeal.

Combination againſt receiving money of a particular coinage, illegal. No. 338. *Hall againſt Billerwell, July* 12. 1787.

The act 19th Geo. II. c. 37. directing monies to be lent on *reſpondentia* bonds, on veſſels to or from the Eaſt Indies, on the ſecurity of the ſhip only, does not prevent the creditor from obtaining additional ſecurity, in the event of the ſhip's ſucceſsfully performing the voyage. No. 185. *Maſon againſt Henderſon, Dec.* 16. 1784.

PAPIST. A Papiſt may, notwithſtanding the act 1701, ſucceed to a valuable leaſe of lands. No. 114. *Roſe-Watſon againſt Gordon, July* 15. 1783.

PASSIVE TITLE. A reſiduary legatee, having accepted from the neareſt in kin a ſum of money for a conveyance of his right, found not liable even to that extent to the creditors of the deceaſed, it appearing that the effects were not ſufficient to pay the teſtator's debts, ſo that the bargain did not in the leaſt diminiſh the creditors fund of payment. No. 66. *Brown againſt Blackburne, Nov.* 19. 1782.

Not inferred univerſally by entering heir *more burgi*. No. 100. *Blount againſt Nicolſon, Feb.* 26. 1783.

The paſſive title of vitious intromiſſion excluded by *bona fides*; the intromitter being found liable to the creditors of the defunct to the extent of the effects intromitted with. No. 113. *Tawſe againſt Findlater and Murray, July* 10. 1783.

A general ſervice as heir of line, an univerſal paſſive title, till it be ſet aſide in an action of reduction. No. 168. *The Creditors of Ayton againſt Ayton, July* 7. 1784.

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Concealment of the deſtination of a ſhip voids the inſurance, though the loſs ſhould happen prior to actual deviation from the voyage ſpecified in the policy. No. 126. *Bain againſt Kippen, Nov.* 20. 1783.

Valued policy. Inſurers are liable for the eſtimated value, though beyond the true, if the eſtimate be made without fraud. No. 132. *Wilſon and others againſt Wordie and others, Dec.* 2. 1783.

A ſhipmaſter having, by ſtreſs of weather, been driven into a port, where he unneceſſarily ſold the cargo at a value below what might have been procured at the deſtined market, the inſurers of the cargo were found not to be liable for the loſs. No. 190. *Richardſon and Co. againſt Stodart and others, Dec.* 22. 1784.

The aſſured, immediately after the inſurer's bankruptcy, may, without giving notification, proceed to obtain a ſecond inſurance; nor will the creditors of the bankrupt afterwards be intitled to the premium, even in thoſe caſes where previouſly to the bankruptcy, the ſhip inſured had arrived in ſafety at its deſtined port. No. 217. *The Creditors of Elliot againſt Moriſon and Company, June* 28. 1785.

A deviation, originating from the ſhipmaſter, and neceſſary for the ſafety of by far the greater part of the cargo, found not to vacate a policy on goods, to the ſafety of which the deviation was unneceſſary, even where, in conſequence of the deviation, a total loſs enſued. No. 241. *Dunlop againſt Allan, Nov.* 24. 1785.

An abandon cannot lawfully be made by the inſured, where a part only of the goods has ſuffered damage. No. 272. *Kempt and Company againſt Glen and others, June* 16. 1786.

Inſurance on a ſhip, warranted to ſail with convoy, with liberty to join at the place of rendezvous, found to be vacated by the ſhip's ſailing four days after the convoy, though before the loſs happened ſhe had received ſailing orders. No. 281. *Dunmore and Company againſt Allan and others, June* 27. 1786.

A veſſel being inſured to a market, ought to proceed thither without any delay being allowed to ariſe from the proſecution of collateral objects. No. 293. *Marſhall, Hamilton, and Company, againſt Crawford and Barns, Nov.* 15. 1786.

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See PACTUM ILLICITUM.

PERSONAL OBJECTION. A purchaſer of lands not infeft having granted a leaſe of them, the leſſee was found not intitled to plead the defect of his author's right. No. 22. *Tod againſt Wells and others, Jan.* 17. 1782.

PERSONAL AND REAL. An aſſignee to an Engliſh bond transferable by indorſation, is affected by the frauds of his authors. No. 265. *Delvalle againſt the Creditors of the York-buildings Company, March* 9. 1786.

A diſpoſition granted for the behoof of the diſponer, but in the terms of an abſolute conveyance, found not to have been annulled by the fraud of the diſponee, in acting contrary to the intention of the diſponer. No. 294. *Thomſon againſt Douglas, Heron, and Company, Nov.* 15. 1786.

An adjudger attaches the ſubject adjudged *tantum et tale* as it was in the right of the debtor. *Ibidem.*

A clauſe in a tack, authoriſing the tenant to pay the landlord's debts, gives, in a queſtion with adjudgers *contra hæreditatem jacentem*, a right of retention, for ſums paid in conſequence of obligations prior to the death of the landlord, of rents due between the time of the landlord's death and the date of the adjudication. No. 346. *Creditors of Sinclair againſt Sutherland, Aug.* 8. 1787.

PERSONAL AND TRANSMISSIBLE. A tenant being, by the leaſe, allowed retention of rent on account of a building to be erected on the lands, was found not intitled to it out of rent due to the granter, the building not having taken place till after the lands were acquired by a purchaſer. No. 306. *Moriſon againſt Patullo and Laird, Feb.* 3. 1787.

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POOR. A father having left the pariſh in which he had acquired a ſettlement, and having afterwards reſided in other pariſhes, in which he had children born to him, the Lords found, That the children were to be maintained by thoſe pariſhes in which they had been born. No. 248. *The Heritors in the Pariſhes of Melroſe and Stitchell againſt the Heritors in the Pariſh of Bowden, Jan.* 24. 1786.

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The ſexennial limitation of bills of exchange is not interrupted by the uſing of a blank citation, as is practiſed in the court of admiralty. No. 160. *Gordon againſt Bogle, June* 23. 1784.

A decreet was obtained by Sir James Grant againſt the Governor and ſix aſſiſtants of the York-buildings Company, for themſelves, and as repreſenting the Company. This was followed with a charge of horning againſt the individuals whoſe names were mentioned in the decreet, but who by this time had ceaſed to be the repreſentatives of the Company. The Lords ſuſtained this horning as a document of interruption, on this ground, That it was a ſufficient intimation to the perſons againſt whom the decreet was obtained, individually, and an intimation to one of many debtors was ſufficient to keep alive the debt againſt the whole. It was pleaded on the other ſide, That in a chartered company, like this, the partners were not bound individually for the debts of the Company. No. 171. *Sir James Grant againſt the Creditors of the York-buildings Company, July* 21. 1784.—This judgment was reverſed on appeal.

On a contract entered into between the Earl of Hopetoun and Colonel Horſey, as acting for the York-buildings Company, a horning followed, which was directed againſt the managers of the Company, without any previous conſtitution of the debt againſt them. The Lords found, That the horning being altogether inept, did not interrupt the preſcription. No. 172. *The E. of Hopetoun againſt the Creditors of the York-buildings Company, July* 21. 1784.—This judgment was affirmed on appeal.

The triennial preſcription of an account not obviated by a writtem commiſſion for the goods, joined to a judicial acknowledgement of the furniſhing. No. 176. *Roſs againſt Shaw, Nov.* 19. 1784.

Vicennial preſcription of holograph deeds. The verity of a holograph deed may be proved by the oath of the granter's heir, reſpecting the appearance of the hand-writing, tho' he

he had no other knowledge whatever of the deed. No. 178. *Dalziel againſt Lord Lindores, Nov.* 19. 1784.

The ſexennial preſcription of bills of exchange, not interrupted by the regiſtration of proteſts taken on them. No. 179. *Douglas, Heron, and Company, againſt Richardſon, Nov.* 26. 1784:

But found to be interrupted by production of the bills in a proceſs of ranking. *Ibidem.*

Act 1695 ſtrictly interpreted; the benefit of it being denied to a perſon, in reſpect he was not bound expreſsly as cautioner. No. 181. *Howieſon againſt Howieſon, Dec.* 7. 1784.

The poſitive preſcription found not to be interrupted by the minority of any ſubſtitute heir of entail. No. 187. *Gordon againſt Gordon, Dec.* 21. 1784.

The benefit of the act 1695 extends not to co-principals, though there be mutual ſtipulations of relief in their favour. No. 198. *Creditors of Park againſt Maxwell, Feb.* 16. 1785.

The Scotch preſcription of forty years, applicable to debts contracted in England, by an Engliſh company, and due to Engliſhmen. In this caſe, however, it was agreed, that the production of a decreet, obtained in England even after the forty years had elapſed, would ſufficiently obviate the objection. No. 264. *Delvale and others againſt the Creditors of the York-buildings Company, March* 9. 1786. This judgement was reverſed on appeal, on hearing counſel for the appellant only.

On what title pleadable. No. 266. *Bald againſt Buchanan, March* 8. 1786.

The ſexennial preſcription of bills of exchange, not obviated by a writing of equal date with the bill itſelf. No. 303. *Buchan againſt Robertſon-Barclay and others, Jan.* 31. 1787.

Vid. Bill of Exchange.

Vid. Qualified Oath.

Presumption, of delivery of a deed. No. 40. *E. of Dalhouſie againſt Maule, March* 1. 1782.

A diſcharge executed by children, of all ſettlements made on them by their father, found not to be applicable to one that at the time was latent and revocable. No. 59. *Henderſon againſt Henderſon, July* 26. 1782.

A father's having by teſtament ſettled a ſum of money on his ſon, found to be a ſufficient ground for preſuming revocation of a ſettlement of the like ſum contained in prior bonds of proviſion. No. 78. *Gallie againſt Mackenzie, Dec.* 18. 1782.

A father having become bound to pay to one of his children a certain ſum, "on his attaining the years of majority, and in the mean time to maintain and educate him in a manner ſuitable to his ſtation in life," obtained for him, when ſeventeen years of age, a commiſſion in the army, and on that occaſion, beſides providing him with cloaths, a ſilver watch, and other neceſſaries, advanced the ſum of L. 150, for levying his complement of recruits. In a queſtion between the ſon to whom the above-mentioned bond was granted and his elder brother, as repreſenting his father, the Lords found, That the ſums advanced in the recruiting ſervice were alone to be imputed in payment of the bond. No. 37. *Campbell againſt Campbell, Feb.* 21. 1782.

Redemption of a right to lands preſumed from lapſe of time, and poſſeſſion under the title of the reverſer. No. 80. *E. of Lauderdale againſt E. of Eglinton, Jan.* 22. 1783.

The delivery, *ſine arbitris*, of a bond of proviſion by a huſband to his wife, found not to import a dereliction of her legal claims. No. 116. *Douglas, Heron, and Company, againſt Cant, July* 29. 1783.

Younger children, thirteen years after their father's death, having purſued their elder brother, for an account of his intromiſſions with the executry, the Lords found the action barred by lapſe of time; the reaſonable preſumption being, either that there were no free funds, or that the younger children had received their due proportion. No. 129. *Wilſons againſt Wilſon, Nov.* 26. 1783.

Where men meet together for accompliſhing ſome plan of general utility, every one is preſumed to agree to the meaſures that are adopted, unleſs he expreſsly declare his diſſent; and therefore the perſons employed in effectuating their deſigns are underſtood to receive an authority from each of thoſe who have at any time concurred in the proceedings. No. 275. *Spottiſwoode againſt Arnot, June* 21. 1786.

See Delivery.

See Approbate and Reprobate.

See Bill of Exchange.

Prisoner. Perſons impriſoned for not payment of the penalties impoſed for the ſecurity of the revenue, not intitled to the benefit of the act of grace. No. 91. *Sir John Stewart againſt Leſlie, Feb.* 5. 1783.

Ceſſio bonorum. That benefit refuſed, in reſpect the bankruptcy had been occaſioned by extravagant living. No. 220. *Maccubbin againſt his Creditors, July* 12. 1785.

Act of ſederunt 1671. The temporary enlargement of a priſoner on a *meditatione fugæ* warrant, falls not under it. No. 249. *Gordon againſt Mellis.*

Ceſſio bonorum. A perſon in trade who omits to keep accounts, not intitled to that benefit. No. 269. *Fraſer againſt his Creditors, March* 10. 1786.

Act of ſederunt, 11th February 1671. What circumſtances are ſufficient to render magiſtrates of a borough liable for the eſcape of a priſoner. No. 285. *Purdie and Company againſt Magiſtrates of Montroſe, June* 29. 1786.

Privileged Debt. Medicines furniſhed during a laſt ſickneſs of long duration, not ſuch. No. 146. *Lawſon and others againſt Maxwell, Feb.* 12. 1784.

Prize. See Captive, Dues, Pactum illicitum, Recompence.

Process. The reclaiming days do not run againſt a pupil whoſe tutor is dead. No. 65. *Grant and his Tutor againſt the Creditors of Skelbo, Nov.* 15. 1782.

Proof, of marriage, how far a written acknowledgement

ledgement of marriage may be redargued by collateral circumſtances. No. 16. *Macinnes againſt More, Dec.* 20. 1781.——Reverſed on appeal.

Though a purſuer cannot, in general, eſtabliſh a debt by the oath of a defender who is a bankrupt, the caſe is different, where the bankrupt, or his creditors, are purſuers. Here the bankrupt's acknowledgement, in matters where that mode of proof would otherwiſe be deciſive, will, along with other circumſtances, be ſufficient to afford a relevant defence. No. 99. *Halkerſton againſt Lindſay, Feb.* 26. 1783.

In queſtions ariſing from acts of an occult nature, ſuch interrogatories may be put to witneſſes as have not an immediate relation to the conduct of the purſuer or defender, provided they are ſuch as tend to the diſcovery of the facts in diſpute. No. 173. *Chalmers againſt Douglas, July* 28. 1784.

How far a witneſs may be required to particulariſe the grounds of his ſuſpicion relative to the matter at iſſue. No. 199. *Chalmers againſt Douglas, Feb.* 22. 1785.

Objection to a witneſs, ſuſtained, That having been previouſly examined in a precognition, his declaration had been ſhown to him before he was re-examined. No. 230. *Fall againſt Sawers, Aug.* 10. 1785.

Of marriage by circumſtances. No. 235. *White againſt Hepburn, Nov.* 18. 1785.

Of marriage by writing, explained by circumſtances. No. 260. *Taylor againſt Kello, Feb.* 16. 1786.——Reverſed on appeal.

Of marriage by circumſtances. No. 262. *Inglis againſt Robertſon, March* 3. 1786.——Affirmed on appeal.

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Oath of a bankrupt admitted to prove the ſubſiſtence of a debt vouched by a bill of exchange, ſo as to obviate the ſexennial limitation. No. 303. *Buchan againſt Robertſon-Barclay and others, Jan.* 31. 1787.

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Pecuniary penalties recoverable on a proof by reference to the oath of the party. No. 336. *The Procurator-fiſcal of the County of Edinburgh againſt Wilſon, June* 27. 1787.

PROVISION TO HEIRS AND CHILDREN. A proviſion by a father, payable at his death, together with a diſpoſition in ſecurity of it, having been granted in favour of his children *naſcituri*, the title to ſuch proviſion found not to be properly eſtabliſhed by ſervice. No. 175. *Cameron againſt Robertſon, Nov.* 18. 1784.

Where a certain ſum has been provided to ſeveral younger children *nominatim*, one of them afterwards ſucceeding as heir, may, nevertheleſs, claim a part. No. 276. *Bryce againſt Bryce, June* 23. 1786.

See BANKRUPT.

PUBLIC OFFICER. Circumſtances ſufficient to diſqualify a candidate for the office of a notary-public. No. 92. *Macaulay and others againſt Angus, Feb.* 13. 1783.

How far the clerk of the bills is liable for the inſufficiency of a cautioner in a ſuſpenſion. No. 201. *Sibbald againſt Inglis, Feb.* 23. 1785.

PUBLIC POLICE. Though perſons ſteeping flax may take water from a running ſtream for ſupplying their lint-holes, in terms of 13th Geo. I. c. 26. they cannot lawfully divert the courſe of a rivulet, or any part of it, into their lint-holes, ſo that it ſhall run through them in a continued ſtream. No. 7. *Kinloch againſt Ogilvie, Nov.* 27. 1781.

As to a tradeſman's ſign-board affixed to the wall of another perſon's houſe. No. 101. *Murdoch againſt Dunbar, Feb.* 27. 1783.

The piazzas on the ſides of the ſtreets of Edinburgh are public property, any encroachment on which, though permitted by the magiſtrates, may be prevented by an inhabitant. No. 105. *Sir William Forbes and others againſt Ronaldſon, March* 3. 1783.

Though perſons qualified to hunt may not, even in the purſuit of foxes, or other noxious animals, enter incloſed grounds, without the conſent of the proprietor, the law is different with regard to farmers purſuing theſe animals for the preſervation of their flocks, who may, without being liable in any penalty, go through incloſed grounds, provided they do not actually damage the grounds or fences. No. 228. *Colquhoun againſt Buchanan and others, Aug.* 6. 1785.

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QUALIFIED OATH. A defender to whoſe oath the fact of reſting owing was referred, having deponed, That the bills of exchange ſued on had been granted by him, through miſtake, inſtead of receipts for money received on account of a ſon of the drawer, to whom, on the drawer's verbal obligation to repay, the defender had remitted goods, the Lords found theſe circumſtances to be intrinſic; and therefore aſſoilzied the defender. No. 36. *Agnew againſt Macrae, Feb.* 20. 1782.

A defender ſued on his bill after the lapſe of the ſix years, acknowledged that he had granted the bill as the price of a quantity of wine; which, however, he added, turned out totally uſeleſs. The Court found him liable. No. 177. *Robertſon againſt Clarkſon, Nov.* 19. 1784.

Though payment to a third party, by the order of the creditor, be an intrinſic quality, where the purpoſe of the order was merely to enable the perſon to whom the delivery is made to ſurrender it to the creditor himſelf; yet where it is intended in this way to extinguiſh a debt due by the creditor to a third party, the perſon making the payment ought alſo to ſhow, by producing a receipt or diſcharge, that the debt due to the third party was actually diſcharged; and therefore his oath of the payment alone is extrinſic. No. 274. *Hay againſt Fulton, June* 21. 1786.

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